INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

FLORIDA EAST COAST RAILWAY COMPANY AND SEABOARD COAST LINE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*) is reported at 322 F. Supp. 725. The "interim report" of the entire Interstate Commerce Commission (App. C, *infra*) is reported at 337 I.C.C. 183. The "final report" of the entire Commission (App. D, *infra*) is reported at 337 I.C.C. 217.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325, to set aside an order of the Commission. The final order of the three-judge dis-

trict court (App. A, *infra*) was entered on February 18, 1971. An order modifying the judgment with respect to certain record keeping matters pending appeal (App. B, *infra*) was entered on April 14, 1971. The United States and the Commission filed notices of appeal (Apps. E and F, *infra*) on April 15, 1971. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc.* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

QUESTIONS PRESENTED

The plaintiffs[1] below were two of the railroads that participated in a nationwide rulemaking proceeding before the Commission for the determination of whether the per diem rental charged by the railroads for the use of each other's freight cars should be increased to include an incentive element. In a tentative decision (the "interim report"), the Commission invited the parties to submit their evidence in written form. The questions presented are:

1. Whether, where agency action in a lengthy, complex and continuing rulemaking proceeding has been taken only after all interested parties have been afforded a full opportunity to submit evidence and argument in written form, appellees are entitled, under Section 556 of the Administrative Procedure Act, to

[1] Seaboard Coast Line Railroad Co. ("Seaboard"), and the Florida East Coast Railway Company ("FEC").

an oral hearing before the Commission without showing that they would be prejudiced by inability to present live testimony or to cross-examine witnesses.

2. If not, whether appellees made a sufficient showing of prejudice by their general assertions that they needed an opportunity for cross-examination of witnesses and the presentation of other evidence at an oral hearing in order to obtain a fair hearing on certain issues, particularly where it is clear that the Commission would arrive at the same conclusion even if they were to establish all they sought to prove.

STATUTE INVOLVED

The proceeding before the Commission was conducted pursuant to the 1966 amendment of Section 1(14)(a) of the Interstate Commerce Act.[2] The amendment added the final two sentences of the three-sentence Section. The complete Section, as amended, 49 U.S.C. (Supp. V) 1(14)(a), provides:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or

[2] Public Law 89-430, 89th Cong., 80 Stat. 168.

practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. (Supp. V) 556(d), provides that in rule-making proceedings, such as under the above statute, "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

STATEMENT

The first sentence of Section 1(14)(a), *supra*, authorizes the Commission to prescribe the ordinary compensation to be paid by one railroad to another for the use of its freight cars. Such compensation is generally fixed on the basis of a daily rate known as "basic per diem."[4] In 1966, Congress amended the statute to require that the Commission determine whether per diem compensation computed solely on the basis of elements of ownership expense should be increased by an "incentive element" to alleviate a long-standing shortage of freight cars by both improving the utilization of the available car supply and expanding the national fleet.

1. *The discontinued investigation of 1966.* Following the 1966 amendment, the Commission issued a notice of proposed rulemaking in a proceeding entitled *Incentive Per Diem Charges*, Ex Parte No. 252 (31 F.R. 9240). After extensive and lengthy proceedings, in which 189 separate railroads participated, including participation by some of them in oral hearings, the Commission concluded that "[a]n overall nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types" (332 I.C.C. 11, 15). It found that "the investigation produced no reliable information

[4] See *Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Nebr.); *Boston and Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass.), affirmed *per curiam*, 396 U.S. 27, rehearing denied, 396 U.S. 1030.

respecting the quantum of interim incentive charge necessary to meet the statutory standards" and further concluded "that the information necessary to this decision is not presently available" (332 I.C.C. at 16). Discontinuing the rulemaking proceedings, the Commission announced its intention to remedy the existing informational deficiency through institution of a nationwide freight car investigation (*id* at 18).

2. ***Freight Car Study of 1968.*** In December 1967, the Commission initiated the present proceeding by requiring all common carriers subject to the Interstate Commerce Act to participate in a study of car demand and supply conditions throughout the country (App. C, *infra,* p. 53a). The railroads supplied a scientific and systematic sampling of car orders, supply and placement, during the study period, in a total of 32,420 reports that covered 2,641 stations on 135 railroads (App. C, *infra,* p. 62a). The Commission found, without serious challenge, that the study was statistically sound (App. D, *infra,* p. 89a). The accumulated data were recorded on magnetic tapes and made available to the carriers (App. G, *infra,* p. 136a).

On May 13, 1969, an initial analysis of the data was presented to the subcommittee on Surface Transportation of the Senate Committee on Commerce.[4] Members of the subcommittee—impatient with delays in implementing the legislative mandate to deal with the pressing problem of car shortages—emphatically ex-

[4] Reprinted in *Freight Car Supply*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

pressed the opinion that the Commission had sufficient information upon which to act. A subsequent Commission proposal for further study of additional types of freight cars was firmly opposed, as unnecessary, by a number of carriers, including both appellees.

3. *Interim decision.* Thereafter, on December 12, 1969, the entire Commission issued an interim report, order, and rule, proposing a scale of incentive charges based on a further analysis of the 1968 data (App. C, *infra*, pp. 51a–84a).[5] Based on the data it then had, the Commission found the existing supply of standard boxcars inadequate to satisfy car demands for at least half the calendar year (App. C, *infra*, p. 54a), and proposed an incentive per diem charge limited to unequipped boxcars on general service, that would provide, on a yearly basis, a return on investment comparable to that which could be expected by investments in nonregulated corporations (App. C, *infra*. pp. 53a–58a). It was anticipated that the proposed incentive would have the dual benefit of improving car utilization of the type in short supply during the period of greatest need, and providing a fund with which to augment the deficient national boxcar fleet (App. C, *infra*, p. 54a).

The interim report emphasized that (App. C, *infra*, p. 55a):

> * * * the proposed incentive charges are both tentative and experimental. Before becoming effective, they are open to comment and criticism, including oral hearing should the circumstances warrant. After becoming effective,

[5] The order and rule were published at 34 F. R. 20438.

> they may be modified as future circumstances require. Here, as with basic per diem, we envision an open-ended proceeding, whereby studies, suggestions, and proposed changes may be submitted as the charges are tested in the light of actual experience.

The interim order invited all interested parties to submit "verified statements of fact, briefs, and statements of position respecting the tentative conclusions reached * * *, the rules and regulations proposed * * *, and any other pertinent matter * * *" (App. C, *infra*, p. 81a). It further directed "[t]hat any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced" (*ibid.*).

Numerous railroads, shippers, governmental agencies, and organizations of shippers responded to the invitation, some favoring and others opposing the tentative rules and incentive charges. Among those seeking an oral hearing were the Long Island Railroad Company and appellees Seaboard and FEC. The Long Island requested "testimony by the Commission's staff which would serve to introduce into evidence the studies relied upon in the Interim Report," and that it be given an opportunity "to cross-examine witnesses in relation thereto and to rebut same."[4]

Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased. It complained that there had been no

[4] Reply Statement of the Long Island Railroad Company, p. 5; and see Long Island's motion for modification of interim order, filed March 16, 1970.

"hearing" and urged that the interim order be "set aside until a proper record can be made."[7] It neither proffered data for the use of the Commission nor described any evidence that it wished to adduce at an oral hearing.

FEC filed a brief, and written evidence in the form of verified statements made by two of its officers. In a 2½ page request for an oral hearing,[8] it stated that it desired to cross-examine "those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex parte No. 252." It stated that it expected to establish through such cross-examination that:

> a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region;
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> b. Railroad ownership of additional plain [standard] box cars would not necessarily change the results summarized in the appendices to the interim report;

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[7] App. A, *infra*, pp. 20a, 27a, Statement of Position of Seaboard Coast Line Railroad Company, filed March 17, 1970, attached as Appendix A to the decision below.

[8] App. A, *infra*, pp. 46a–48a; Representations of Florida East Coast Ry. Co. and Request for Oral Hearing and Oral Argument, filed March 17, 1970, and attached in part as Appendix B to the decision below.

c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year;

d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

4. *Final Commission decision.* On April 28, 1970, the Commission entered its final report, order and rules (App. D, *infra*, pp. 85a–114a). With modifications not here relevant, it adopted the conclusions of the interim report and set forth additional detailed findings in response to the submissions of the parties. The Commission found that no party had been prejudiced by the submission of evidence in written form and that therefore, under Section 556 of the Administrative Procedure Act, the hearing requirement of Section 1(14)(a) of the Interstate Commerce Act had been complied with (App. D, *infra*, p. 87a). It reiterated that this was an "open-ended" proceeding in which the parties were expected to bring to its attention "any evidence of circumstances requiring modification of the rules * * * as experience is gained under the new regulations" (App. D, *infra*, pp. 87a–88a). The requests for oral hearing were denied "in the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern" (App. D, *infra*, p. 88a). The Commission stated, however, that the

requests could be renewed "as experience is obtained with the incentive charges" (*ibid.*).

The Commission denied exemptions to any groups of railroads, but emphasized again that, "following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding" (App. D, *infra*, p. 103a).

5. *The New York litigation.* The Long Island Railroad attacked the Commission's denial of an oral hearing in an action filed in the Eastern District of New York. *Long Island Railroad Co.* v. *United States*, 318 F. Supp. 490 (App. G, *infra*). The three-judge district court, in an opinion by Circuit Judge Friendly, sustained the Commission's decision. It held that under Section 556(d) of the Administrative Procedure Act the agency could properly rely upon evidence submitted in written form without an oral hearing, unless a party would thereby be "prejudiced" (App. G, *infra*, pp. 134a–137a). Long Island's request for an oral hearing failed to notify the Commission of possible prejudice because it did not specify the need for cross examination or presentation of live rebuttal testimony (App. G, *infra*, pp. 136a–137a).

Considering specific representations of prejudice made to it but not to the Commission, the court concluded that it was not shown "how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided

materially in their resolution" (App. G, *infra*, p. [illegible] emphasis supplied). The court emphasized that "the decision here called for a leap of judgment by the Commission which detailed figures would inform but could not determine" (*ibid.*).

6. *The instant litigation.* Seaboard and FEC attacked the Commission's decision in separate suits, which were heard together by a three-judge court for the Middle District of Florida. Without reaching the merits of the per diem order, the district court reversed and remanded on the ground that Seaboard and FEC had not been given an oral hearing (App. A, *infra*, pp. 1a–16a). In ruling that it was not enough that the two railroads had been given an opportunity to present their own analyses of the 1968 data or any other pertinent evidence they desired in written form, the court distinguished the *Long Island* case on factual grounds (App. A, *infra*, pp. 7a–8a); the court concluded, without substantial analysis, that "assertions" made by Seaboard and FEC to the Commission "demonstrate the prejudice" of denying them an oral hearing (App. A, *infra*, p. 8a).

The district court found the Commission's argument that the evidence to be adduced must be capable of materially affecting its decision "wide of the mark" (*ibid.*); it insisted that the Commission give "strict adherence to cherished procedural rights" in the form of oral hearings (*ibid.*). The court found its conclusion "fortified" by statements of the Commission's former General Counsel before the Senate subcommittee that

"hearings" were necessary in order to impose incentive per diem charges (App. A, *infra*, p. 16a).

THE QUESTIONS ARE SUBSTANTIAL

1. In amending Section 1(14)(a) in 1966 to provide for per diem incentive charges, Congress was reacting to severe boxcar shortages throughout the nation. The Senate Committee on Commerce had reported that:

> Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted * * * *

The immediate effect of the court's order is to exempt Seaboard and FEC from the operation of the incentive rules and charges imposed by the Commission in its first order under the new statute.[10] Seaboard is one of the nation's largest railroads.[11] FEC, although a much smaller railroad, terminates thou-

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[9] S. Rep. No. 386, 89th Cong., 1st Sess., pp. 1–2; see also H. Rep. No. 1183, 89th Cong., 1st Sess.

[10] The order has become effective with respect to all carriers other than Seaboard and FEC, neither of whom have paid or received incentive per diem since the promulgation of the Commission's order as a result of a temporary restraining order entered by the district court. That order, as continued by further order following entry of the court's judgment (App. B, *infra*, p. 49a), requires both carriers to maintain records adequate for reimbursing creditor lines should the judgment be reversed on appeal.

[11] Seaboard was formed by the merger of more than 9,700 miles of railroad throughout the Southeastern portion of the country under the decision of the Commission in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122.

sands of boxcars each year in Florida and has frequently been the subject of Commission orders requiring it to deliver boxcars, remaining on its lines in excess of its own requirements, to carriers in need of cars.[13]

But beyond this immediate impact, the decision below threatens to disrupt the entire national plan before it has been given a fair trial. The great majority of the nation's railroads have not attacked the new charges. If the decision below is permitted to stand, however, other railroads will be encouraged either to seek a broader reopening of the proceeding or to bring lawsuits to set aside the Commission's order. At least one other major railroad has threatened such litigation. The rules and charges here in issue are so central to the alleviation of the freight car shortage that the validity of the Commission's decision and of its procedures should not be left uncertain.

2. The decision of the Florida court is in basic conflict with the decision of the New York court in *Long Island Railroad Co., supra.* This Court should resolve the conflict for the guidance of the Commission and other agencies governed by the Administrative Procedure Act.

The New York court correctly read Section 556(d) of the Administrative Procedure Act to require an oral hearing only if shown to be needed to enable a

[13] Several "car distribution directions" against FEC entered by the staff of the Commission in 1969 and 1970 were made a part of the record in the district court at the hearing on the motion for temporary restraining order.

party fairly to present its case (App. G, *infra,* pp. 134a–137a). Assessing the Long Island's post-Commission decision specification of prejudice, the court found that the matters raised had already been dealt with extensively by the Commission and that an oral hearing was not required. Underlying the court's decision was its recognition that the Commission had acted to deal with an urgent matter of national concern based on its own analysis of data that was freely available to the railroads and on which they had commented extensively in writing (see App. G, *infra,* pp. 135a–136a).

In sharp contrast, the court below made no inquiry into whether Seaboard or FEC had shown a need for cross-examination or the presentation of live testimony[13] and also failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclusions. Instead of such analysis, it merely admonished the Commission to give "strict adherence to cherished procedural rights" (App. A, *infra,* p. 8a). An examination of the matters raised by appellees, however, shows that it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order. Seaboard's statement of position before the Commission did not even generally describe the specific evidence to be adduced at an oral hearing.

[13] The court's opinion seems to ignore the fact that the carriers were permitted to present written evidence, and states only that they were permitted to file "statements of position" (App. A, *infra,* p. 5a).

And the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission would readily have agreed with each "fact" sought to be adduced without changing any of its conclusions.[14] Moreover, the issues in dispute raised policy rather than factual questions and were adequately considered by the Commission.[15]

We believe that before any party to a broad rulemaking proceeding can show that "prejudice" within the meaning of 5 U.S.C. 556(d) will result from restricting the submission of evidence to written form, it must show with some specificity what either cross-examination of witnesses or live testimony can add to the record and that the addition could materially affect the agency decision. This principle is squarely supported by the New York decision, but cast in con-

[14] For example, FEC sought to prove that the failure to fill orders "may" not be affected by car supply; that ownership of more cars "would not necessarily" improve the car shortage; that the number of additional cars needed to furnish "all" cars on the day ordered is not known; and it is unreasonable to expect railroads to supply cars for loading within 24 hours in "all" instances. See pp. 9–10, *supra*.

[15] Seaboard's principal objection before the Commission was that the application of incentives solely to standard boxcars unfairly penalized Seaboard for heavy purchases of specially equipped cars to meet the peculiar needs of its shippers (App. A, *infra*, pp. 21a–25a). FEC's main contention was that it should be excluded from the burdens of the incentives because of its status as a terminating line (App. A, *infra*, 34a–39a). Both are fundamental policy questions that were fully considered by the Commission, subject to the continuing nature of this proceeding (App. D, *infra*, pp. 91a–92a (limitations of incentives to unequipped boxcars); pp. 99a–101a (no exemption for terminating lines)).

siderable doubt by the decision here on appeal. If the court below is correct, then significant new avenues of delay are available to adversaries in rulemaking proceedings before administrative agencies. If a party can require an agency to convene an oral hearing by a bare assertion that it desires to cross-examine witnesses, administrative rulemaking could become bogged down in almost endless hearings.[16] Cross-examination is, of course, not available to witnesses in legislative hearings, to which administrative rulemaking hearings are closely analogous, and Congress has wisely refrained from engrafting a routine right of cross-examination on those "quasi-legislative" administrative proceedings.

This Court has never definitively interpreted the term "prejudice" in 5 U.S.C. 556(d). Consequently, this appeal raises questions, affecting numerous agencies of the federal government, which in one sense are questions of first impression. The decision of the court below, however, is contrary to many statements of this Court which have indicated that it will

[16] The district court, in our view, misinterpreted the remarks of the Commission's former General Counsel, Mr. Robert W. Ginnane, before the Senate Subcommittee. Mr. Ginnane was distinguishing Section 1(14)(a) from the emergency powers conferred upon the Commission under Section 1(15), which may be exercised without a hearing. He did not attempt to define the type of hearing required under Section 1(14)(a), nor did he address himself to whether written testimony could satisfy the statutory "hearing" requirement. He stated only that it was necessary for the Commission to give "an *opportunity* for a hearing", a formulation fully consistent with the Commission's present position. (App. A, *infra*, p. 14a.)

"never presume that Congress intended an agency 'to waste time on applications that do not state a valid basis for a hearing.'" [17]

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1971.

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[17] *Denver Stock Yard* v. *Livestock Assn.*, 356 U.S. 282, 287, quoting from *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205. See, also, *Yakus* v. *United States*, 321 U.S. 414, 436; *Lincoln Transit Co.* v. *United States*, 256 F. Supp. 990, 994 (S.D.N.Y.).

APPENDIX A

United States District Court Middle District of Florida Jacksonville Division

No. 70-574-Civ-J

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, FLORIDA EAST COAST BUILDING, ST. AUGUSTINE, FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

No. 70-577-Civ-J

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Before SIMPSON, Circuit Judge, and MCRAE and SCOTT, District Judges

SIMPSON, Circuit Judge. These are actions under Title 28, U.S.C., Sections 1336, 1398, 2284 and 2321-25, to set aside the incentive per diem rates established by the Interstate Commerce Commission (Commission) in its rulemaking proceeding entitled *Incentive Per Diem Charges—1968.*[1] In this proceeding the Commission issued two formal reports comprising its decision,

[1] Ex Parte No. 252 (Sub-No. 1).

the interim report of December 12, 1969 [2] and the final report of April 28, 1970.[3]

On August 28, 1970, Judge McRae for this three-judge court entered two orders restraining the operation of the Commission orders but only insofar as they affected the two plaintiffs before the court. The temporary restraining orders were amended by order of August 31, 1970, to prevent the plaintiffs from benefitting from the rules and charges during the period they were not required to pay incentives by requiring them to keep records in order to make restitution to other railroads if so ordered by final decision of this court.

The dispute arose against the following background. For a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods. The incentive per diems are an attempt by the Commission to alleviate this problem at least in part.

The Commission was first given the power in 1917 to regulate car service and the compensation paid by railroads for the use of cars not owned by the railroad utilizing the car. The current statutory authority for such regulation is embodied in Section 1(14)(a) (49 U.S.C. 1(14)(a)) of the Interstate Commerce Act:

> § 1, par. (14). Establishment by Commission of rules, etc., as to car service. (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement or arrangement for the use of any locomotive, car, or

[2] 337 I.C.C. 183.
[3] 337 I.C.C. 217.

other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

The Commission also was given the power to meet emergency situations by summary measures without notice or hearing. Title 49, U.S.C., Sec. 1(15). Considering these powers insufficient to meet the continuing crisis in the railroad industry, Congress in 1966 added the following language to Section 1(14)(a) to give the Commission wider discretion in dealing with rail car shortages:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the

Commission finds it to be in the national interest.

Thereafter the Commission began an investigation, *Ex Parte No. 252, Incentive Per Diem Charges*, to determine the appropriateness of the establishment of an increased incentive. 332 I.C.C. 11, 12 (1967). In October 1967, the Commission concluded that the information it had accumulated was insufficient to draw any conclusions therefrom, and discontinued the proceeding. In December 1967, the Commission initiated a rulemaking procedure requiring the Class I and II railroads to gather and report to the Commission detailed information concerning freight car supply and demand for a specified period. It is clear that at that time further hearings were contemplated prior to the enactment of any new rules. The information submitted by the railroads was analyzed and presented to Congress by the Commission in a "Report of the Results of Freight Car Study in Ex Parte No. 252 (Sub No. 1)". Members of the Senate Subcommittee on Surface Transportation expressed considerable dissatisfaction with the Commission's apparent inability to take effective steps toward eliminating the national shortage of freight cars. Comments were general that the Commission was conducting too many hearings and taking too little action. Senators pressed for more action and less talk, but Commission counsel expressed doubt respecting the Commission's statutory power to act without additional hearings. Despite Commission counsel's expressed misgivings about straightaway action, the Commission in December 1969 published an Interim Report announcing its tentative conclusions to adopt incentive per diem charges on standard boxcars based on the information compiled by the railroads to be in effect from September 1 to the end of February of each year. Attached to the Report was

a proposed rule adopting the Commission's tentative conclusion. The railroads were requested to make statements of position and were informed "that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced". Seaboard Coast Line (Seaboard) and Florida East Coast (FEC) requested oral hearings, as did numerous other railroads. In April 1970, however, the Commission entered its order without holding further hearings, finding that the procedure did not prejudice the parties and that further hearings could be held as experience under the incentive plan dictated. These suits followed.

Seaboard, in its attack upon the actions of the Commission, alleges (1) that the Commission failed to afford it a proper hearing and that such failure prejudiced Seaboard, (2) that the Commission failed to comply with the requirements of Section 1(14)(a) of the Act, and (3) that the Report and order of the Commission does not contain reasons and findings sufficient to support the Commission's conclusions. FEC joins in Seaboard's arguments that it was improper for the Commission to act without further hearings and that the Commission's conclusions are not based on substantial evidence, and also adds the contentions that (1) the Commission's order is so unreasonable as to deny due process and (2) that the Commission should have exempted FEC from incentive per diem payments. Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermit discussion of all but the first point.

The parties agree that what is at issue is the question of what degree of procedural due process accompanies a Commission rulemaking proceeding. Section

1(14)(a) of the Interstate Commerce Act clearly states that the Commission may establish reasonable rules, regulations, and practices with regard to the subjects described therein *after hearing*. Section 1(14)(a), however, is modified by provisions of the Administrative Procedure Act (APA), Title 5, U.S.C., § 551 et seq. Section 553(c) provides "When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection". The pertinent section to the problem at hand, Section 556(d), provides:

> (d) Except as otherwise provided by statute the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. *In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.* (Emphasis added)

The Commission argues that the emphasized portion of the statute allows the procedure utilized by the Commission in this instance, relying primarily upon the able opinion of Judge Friendly for the

statutory three-judge district court in *Long Island Railroad Company v. United States,* 318 F. Supp. 490 (E.D.N.Y., July 22, 1970) involving the same Commission April 1970 order. In *Long Island* the court concluded that the plaintiff railroad had shown no prejudice from the procedures utilized by the Commission, noting that "Long Island's request for an oral hearing was silent as to any request in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal". 318 F. Supp. at 499. However, that court expressly limited its holding by warning "If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case". Op. cit. at 499.

We think that the facts of the instant case fall within the exception expressed in *Long Island,* and demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission. For instance, the Seaboard noted in its statement of position its recent acquisition of large numbers of specialty cars in reliance on the well-established Commission principle that a railroad's primary duty is to provide effective service to the shippers in its area, and pointed out that the sudden emphasis by the Commission on unequipped boxcars to the exclusion of other cars would punish the Seaboard for its reliance. Seaboard questioned the foundation for the board's order, labeling it an experiment the results of which the Commission was unable to predict. Seaboard also contested the "earmarking" aspect of the funds received by each railroad from the operation of the incentive per diems. It observed that the hasty action

of the Commission—decided upon without hearings and with conclusions so admittedly tentative as to give validity to the label "experiment"—would cost Seaboard approximately 1.8 million dollars annually. FEC presents an even stronger case for a hearing. FEC details its status as a terminating line and the asserted strong policy reasons for exemption of FEC from the incentive per diem charges. FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions. The statements of Seaboard and FEC are attached hereto as Appendix A and B, respectively. Without discussing in detail the grounds there urged as requiring a hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings.

The Commission contends that even if the plaintiffs prove all that they seek opportunity to prove, the Commission's order can still be sustained. That argument is wide of the mark. Statutory and constitutional procedural due process does not direct itself to the question of what decision should be reached in any given case, but rather deals with the process of decision making. Numerous decisions made on insufficient records are eventually sustained after being supplemented by further hearings, but that does not negate the right of the parties to be heard. Anyone can make decisions, but strict adherence to cherished procedural rights is necessary to insure that the decisions are informed.

Excerpts from the testimony of the Commission Chairman, Mrs. Brown, in the hearings before the Senate Subcommittee on Surface Transportation of

the Committee on Commerce, held May 13, 1969, Serial No. 91–8, and the accompanying statements of Mr. Ginnane, Commission counsel, forecast this litigation and offer insight into the reasons for the actions of the Commission:

> Senator HARTKE. All right. Let me come straight to the question that I think is paramount. That is the question of legal interpretation of the act itself and the amendments. It is my understanding that the Commission and its legal authorities have taken the position that before any type of basic action can be taken, before any preventive measures can be taken, it must be shown that there is an actual shortage which is determined in accordance with a hearing.
>
> In other words, that you have to establish a shortage by competent testimony and study before you can act even though it is arguable that preventive hearings are not required by the act.
>
> Now, I would like to have a statement as to whether or not I correctly interpreted what the Commission's interpretation of the law is?
>
> Mrs. BROWN. I believe you said preventive actions?
>
> Senator HARTKE. Yes.
>
> Mrs. BROWN. As we have stated, in the statement itself, that a hearing is necessary and I am going to refer the technical legal question to our general counsel, Robert Ginnane, who is seated at the end of the table.
>
> Mr. GINNANE. In answer to your question, Senator, I don't want to be too dogmatic.
>
> Senator HARTKE. Lawyers never are, don't worry about that. I am a lawyer myself.
>
> Mr. GINNANE. For this practical reason, I don't know what ultimate action of the Commission I may be defending in the Court and I don't want to say it in words that may be thrown in my face.

The CHAIRMAN.[4] Say that again. I didn't hear you.

Mr. GINNANE. I don't want to make a statement here that can be thrown in my face in any later court proceedings.

The CHAIRMAN. You mean about box car shortages?

Mr. GINNANE. In terms of the defending——

The CHAIRMAN. Excuse me, I don't want to interrupt, but I don't understand your comment.

Mr. GINNANE. I mean in terms of defending any order which the Commission might issue. But I can answer your question to this extent——

The CHAIRMAN. If you were in the court whose side would you be on?

Mr. GINNANE. Defending whatever order the Commission issues.

Senator HARTKE. Well, I do not think that you have any more responsibility to the Commission than you have to the Congress of the United States. You do not have a responsibility which is more supreme than that owed to the Congress.

After all, the Commission is an arm of the Congress and this is a hearing in front of the Congress. We are not just up here representing our own personal viewpoint.

You are an arm of the Congress. In my opinion, and I say this and don't insist upon it, in my opinion it is your responsibilty to give an interpretation of the Act as you understand it and let the chips fall where they may after that.

If the Commission decides to overrule you they had better get a new counsel.

Mr. GINNANE. I think I can be helpful in this way, Senator: As Chairman Brown pointed out, the Commission can fix per diem.

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[4] Senator Magnuson, Chairman of the Senate Committee on Commerce.

Senator HARTKE. That is interpretation; is that right?

Mr. GINNANE. Yes; there must be a hearing. That is in the beginning of section 1(14)4, the Commission may, after hearing, on a complaint or upon its own intitiative.

Senator HARTKE. That is the Commission may, after hearing on a complaint, or upon its own initiative without complaint.

Mr. GINNANE. But in either event only after a hearing.

Senator HARTKE. Why?

Mr. GINNANE. Because the Congress has so reported it in the opening clause of section 1 (14). The Commission may after a hearing.

Senator HARTKE. If you go back to the amendment itself which was enacted in 1966, this amendment was put in there specifically for the purpose of eliminating the very problem that we had. Tell me in that section where you conclude that you must have a hearing, especially in view of your emergency powers under section 1, subsection 15.

Mr. GINNANE. I have to call your attention to the fact that in the emergency powers of section 1, paragraph 15, we can act summarily and without a hearing on every element except the element of compensation to be paid for the use of cars.

That 1(15) goes on to provide that the compensation will be for the use of cars resultant from our exercising powers. If the carriers cannot agree on that compensation, it must be fixed by the Commission after a hearing.

* * * * *

Mr. GINNANE. Even under 1(15) we can't fix rates of compensation without a hearing.

Senator HARTKE. Do you have trouble having a hearing, I mean since 1966? One of the reasons I set the hearing for this date was that I wanted to preclude your coming in with another delay. I wasn't going to wait any longer.

What I am asking you is why didn't you have the hearing? What is there to prevent you, you have this material. Is there any reason? I think that the people who are involved here—you have the shippers, the carriers, and the public all lose money and the report that you have here, which is filed today and I am glad you have it here, indicates that it is a rather substantial loss.

These are losses not alone to those people involved but to the total Nation's economy.

Mrs. BROWN. Well, I can simply say, as you know, the study has been presented to you in the form that it is now and——

Senator HARTKE. And it has one of those little hookers on the end of it that the railroads are now going to claim that they want an advisory commission that you are going to come in and recommend an advisory commission and we are going to have this S of S syndrome right back in our face again.

If you raise the basic per diem to $4.50 or $5, would not these cars find their way home very fast? Wagging their tail behind them?

Mrs. BROWN. Well, that precisely, I don't know about the amount, but that precisely is the position that the Commission is trying to get itself in which our lawyers have told us there must be a hearing on and at the outside date would be within 3 or 4 months.

It could be even closer than that. In order to have the proper record.

The CHAIRMAN. Why do you say there must be a hearing? You have authority, unless I am wrong when I wrote the act, to act on your own initiative without a hearing. I mean it is advisable if you can have a hearing, I understand that, or am I wrong?

Mrs. BROWN. Well, I am going to defer to my general counsel again because I am told that you have to have a hearing.

The CHAIRMAN. You can issue an emergency order at any time without a hearing. If the

act doesn't allow that we are going to change it, I will tell you that. What is the use of having a hearing on these things? I just don't understand. I don't understand what you are doing here. What is this exhibit appendix D? Can anybody understand that?

If C is greater than 1.96, the chances are 95 out of 100 that the differences is significant.

If C is greater than 2.58, the chances are 99 out of 100 that the difference is significant. The difference is ratio 1 minus ratio 2. Compute the standard area of the difference and when 2 over 1 is squared with the sampling error, the square of the sampling error is the second ratio and you compute the difference between C and D.

Now, what has that to do with boxcar service?

Mrs. BROWN. I am going to defer this question to Mr. Bybee, who heads the staff.

The CHAIRMAN. I don't think anybody can understand this thing. I thought the income tax form was bad enough, but this is something else. In other words, let's get down to some basic facts here.

We have been going at this thing how many years? Long before any of you were ever down at the ICC. I hate to repeat this but I am sure that your Chairman will allow me to, the very first meeting of the Commerce Committee I went to 25 years ago, we were discussing boxcar shortages. Twenty-five years ago.

Here we are again with studies C over D and X over C. Now, we know we are going to have a boxcar shortage in the fall.

Isn't there someone of us that can do something about it and if you haven't got enough authority under the law, we will change it for you. You can hold hearings until doomsday on these things. I suspect that we have a storeroom full of hearings on boxcar shortages. We have to move them out to Virginia, to a fieldhouse

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out there because we can't handle them here, the building isn't big enough.

Now the Department of Transportation is going to study it. In other words, why study boxcar shortages, you have a shortage. You are going to have one with this year's crop. A big one.

What can we do about it, have another study? This, I don't understand.

I will ask a simple question, you can act without a hearing, am I wrong?

Mr. GINNANE. In my opinion the Commission cannot fix compensation without an opportunity for a hearing.

* * * * *

Senator HARTKE. How would you change this to do what the Chairman wants to do? In other words, he says you can operate without a hearing, what would we have to change?

Mr. GINNANE. To make it clear that you intended us to fix rates for the compensation without a hearing.

The CHAIRMAN. That is under emergency matters. I think that is pretty clear, you said you could act on your own initiative.

Mr. GINNANE. As I read it, sir, the Commission may, after a hearing on a complaint or on its own initiative, but after a hearing.

The CHAIRMAN. And the purpose of the law was that you could act on it. You can't have feelings on these things, the wheat in Wyoming will be lying on the ground when you start to hold hearings on it. Well, maybe we better amend the law for you to make it clear. Do you want the committee to give you an expression of intent? We can do that pretty fast.

Senator HARTKE. I can give you my expression of intent right now.

The CHAIRMAN. We want to clear up the freight car shortage. I have been in this 25 years and we haven't done it. Now you come up with some gobbledygook like this. I don't understand it. It is the duty of you people down

there to come up with some answers. What can we do?

Senator HARTKE. This is why people are getting mad at bureaucrats, if you want to know the truth. I am not against bureaucrats, I just don't like the way they act sometimes. Let's review that, Mr. Counsel.

This is section 1(15). Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergencies requiring needed action exist in any section of the country, the Commission shall have and it is hereby given authority either upon complaint or on its own initiative without complaint, at once, if it so orders, without answer or formal proceeding by the interested carrier or carriers or without notice hearing order the making or filing of a report according to, as the Commission may determine, (a) to suspend the operation of all rules, regulations, or practices established for car service until such time determined by the Commission, (b) to make such just and reasonable corrections with respect to car service without regard to the ownership during which such emergency will best promote the interest of the public and the commerce of the people, upon such terms of compensation as the carriers may agree upon or in the event of their disagreement, the Commission may after subsequent hearing find to be just and reasonable.

That is where you hang your hat, upon that portion, is that right?

Mr. GINNANE. That's correct. We can act in terms of controlling the distribution and the use of cause without hearing.

Without question, if the actions of the Commission were in accord with legal and constitutional safe-

guards the mere fact that Commission counsel initially thought hearings necessary would be irrelevant. Nevertheless our conclusion, reached from an independent study of the record, is fortified by the fact that Commission counsel is clearly on the record before Congress as advising that hearings comprised a necessary step in the promulgation of the rules in issue here today. Counsel correctly prophesied the shape of these proceedings.

The unfortunate aspect of our ruling is that action on rail car shortages, assuming they exist (as we do), are now further delayed to allow additional hearings to be conducted. This result often ensues when administrative agencies, whether from Senatorial pressure or from other cause, attempt procedural shortcuts in decisionmaking. The shortcut frequently turns out to be the longest way home.

It is ORDERED in accordance with the foregoing that the order of the Interstate Commerce Commission dated April 28, 1970, and styled *Ex Parte No. 252 (Sub-No. 1), Incentive Per Diem Charges—1968,* is enjoined, annulled and set aside insofar as the same affects the plaintiff railroads in these proceedings and the enforcement of the Commission order is as to said plaintiffs enjoined, annulled and set aside, all without prejudice to further proceedings before and further findings and orders by the Commission not inconsistent with this opinion-order.

DONE and ORDERED at Jacksonville, Florida, this 18th day of February, 1971.

BRYAN SIMPSON
United States Circuit Judge.
WM. A. MCRAE, JR.
United States District Judge.
CHARLES R. SCOTT
United States District Judge.

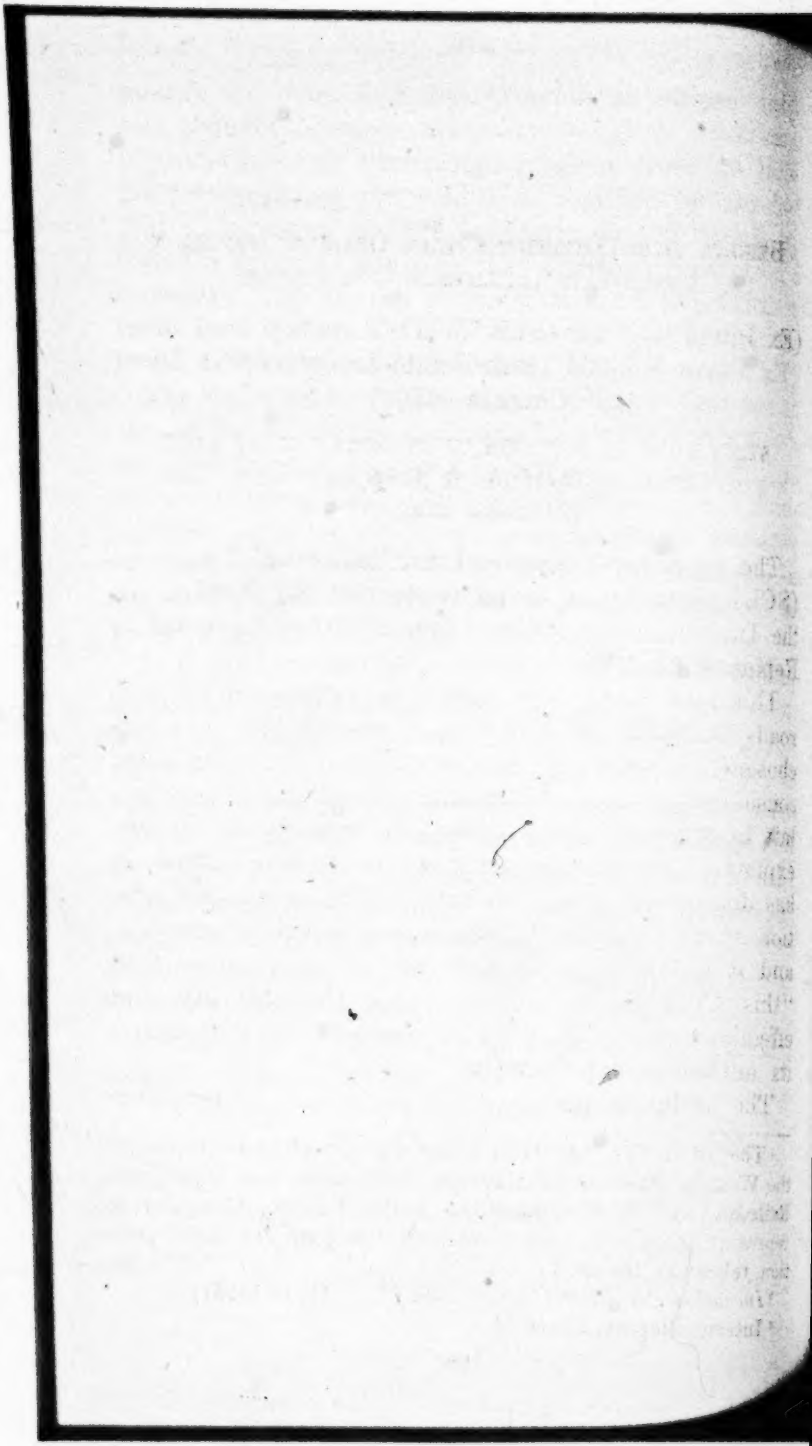
APPENDIX A TO DISTRICT COURT OPINION BEFORE THE INTERSTATE COMMERCE COMMISSION

(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem Charges—1969)

STATEMENT OF POSITION OF SEABOARD COAST LINE RAILROAD COMPANY

RICHARD A. HOLLANDER,
Attorney for Seaboard Coast Line Railroad Company.

MARCH 17, 1970.



BEFORE THE INTERSTATE COMMERCE COMMISSION

(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem Charges—1969)

STATEMENT OF POSITION OF SEABOARD COAST LINE RAILROAD COMPANY

The Seaboard Coast Line Railroad Company (SCL) opposes the tentative conclusions reached by the Interstate Commerce Commission in its Interim Report served December 22, 1969.[1]

This proceeding is of great importance to all railroads including the SCL, yet the Commission has chosen to approach it hastily, without the usual care, consideration and explanation. In doing so, it has left unanswered many questions, and it has left unexplained the reasons for many of its conclusions. It has done these things in spite of its earlier recognition of the probable severe impact of the proceeding, and it has done so in the face of its promise that "this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously.'"[2]

The "solution proposed'"[3] was given to us less than

[1] The SCL also has been asked by the Georgia Railroad, the Western Railway of Alabama, the Atlanta and West Point Railroad, and the Chattahoochee Valley Railway Company to represent them here and to express for them the same position taken by the SCL.

[2] *Incentive Per Diem Charges*, 332 I.C.C. 11, 17 (1967).

[3] Interim Report, Sheet 14.

than three months ago, without hearing, and, since then, the SCL has been diligently conducting its own studies for the purposes of understanding the reasons for the conclusions reached and of measuring the impact of the proposal on its operations. Those studies still are underway, but the due date for statements now is here. The SCL sought more time to measure the new plan, but that opportunity has been denied. Therefore, we are here, before the Commission, without a real chance to present detailed verified statements. That is one of our objections.

There are others. Our studies have progressed far enough to indicate major flaws in the Commission's proposition.

It has become clear, as we look into the Commission's plan, that some of the more progressive roads in the area of car supply, including the SCL, will be penalized for their proficiency. The reason for this conclusion is the fact that the tentative charges are applicable only to standard box cars. They don't apply to specially equipped box cars, and this railroad, being one of the leaders in tailoring its cars to the needs of the shipping public, now must suffer because it does not own more of the less-desirable plain boxes. Stated succinctly, when the latter type of equipment is on the lines of the SCL, it pays; when the SCL's special, expensive, more-modern box cars are on foreign lines, the SCL does not receive incentive payments. This one-way street approach places a premium on antiquity. Furthermore, it fails to heed the admonition of Section 1(14)(a) of the Interstate Commerce Act that all relevant car supply factors are to be considered.

Assuming, for the moment, that the Commission changes its tentative proposal to cover all types of box cars, or, assuming that a given carrier is a creditor line insofar as plain box cars are concerned, there appears

another disturbing feature in the report served last December 22. It relates to "Earmarking of Funds."[4] First of all, the funds are to be tied up until "the carrier has in the same calendar year already built or purchased [or rebuilt] its 1964–1968 average number of such boxcars." Aside from the tying up of funds, what will happen to the dollars if the average is not reached in a given calendar year? Then, and perhaps most important, what possible data does the Commission possess to warrant a conclusion that the earmarked funds should be used to acquire "unequipped boxcars" when experience indicates that shipper needs are ever shifting towards specialized box cars?

This leads the SCL to a most vital objection. Obviously, it, and certain other railroads, are being forced by the Commission into a mold which has been cast to fit carriers with dissimilar transportation requirements. It has become clear from a study of the Interim Report that it was written with a limited type of railroad and certain shippers in mind. It should not have been, for the mandate of Section 1(14)(a) of the Act is ignored, and the section has been used only as a crutch to prop up limited interests. The incentive charges were not drafted to fit the "national level of ownership." We know that grain shippers have problems, and that, at times, great pressure is put on the Commission to find some way to get them additional unequipped box cars. But, the shipper and carrier interests in the part of the country which the Commission refers to as Zone 3 face in a different direction. As a result, the SCL, confronted by its users with the desire for specialty box cars, now would be required to ignore many of the needs of the Southeast. Prior to this Interim Report the Commission had told us just the opposite; that each railroad should

[4] Interim Report, Sheets 11–12; page 3 of appendix to order.

so acquire equipment as to protect traffic originating on its own line.

Several years ago, on April 26, 1962, in Philadelphia, Commissioner Murphy, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "(r)ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, just last year the Commission expressed its thoughts.[8] Speaking of the equipment demands of shippers, Division 3 said:

> "The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

> "One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines, is apparently being ignored. Such

[8] *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 286, 287 and 290.

> a situation we find to be unconscionable and one that must not be continued."

When then-Chairman Webb testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Section 1(14)(a), he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the service of the Interim Report last December 22, the SCL had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. It still believes so, and it should not be forced by the Interim Report into the purchase of standard box cars when its business requirements make the acquisition of other kinds of equipment more desirable.

If we, on the SCL, are going to be asked to disregard our own rail users, at the very least we should know why the Commission has reached that conclusion. And, we don't know. Discussions in the Interim Report with respect to Zone 3 carriers are noticeably missing. This failure to give reasons for the limited applicability of the incentive per diem requirements, without a reasonable opportunity to be heard, does not comport with the requisites of law.

On March 27, 1969, Chairman Stafford, speaking in Minneapolis, said that Section 1(14)(a) "does not automatically place the Commission in a position to prescribe the increased per diem incentives," but that instead:

> "The statute requires a full hearing for determining whether incentive per diem should be imposed."

When he testified in 1965 before the Senate's Committee on Commerce regarding Section 1(14)(a), then-Chairman Webb said the same thing, noting, in addition, that "no sudden change in per diem charges would be effected by the proposed legislation." We believe that the "tentative approach"[6] used by the Commission is too superficial, and that approach, alone shows why all of the affected parties should be heard.

Without a hearing, and without an adequate discussion of reasons behind basic conclusions, the affected parties run risks such as this. In its Interim Report the Commission expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars."[7] The SCL has been diligent in acquiring equipment to meet the needs of its shippers, and can be said to be a creditor road, yet the new tentative order will penalize the SCL and will not send to it any "flow of funds." Instead, the SCL's tentative studies show that it will lose in excess of $1.5 million each year as a result of the Commission's "experiment," to the detriment of its car supply program.

Further, with regard to the quotation in the previous paragraph, had there been a hearing in this matter, the parties would, no doubt, have brought attention to this statement of Commissioner Webb before the Senate Committee in 1965:

> It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are not per diem debtors. Other railroads terminate so much more

[6] Interim Report, Sheet 6.

[7] Interim Report, Sheet 5.

> traffic than they originate that they would be substantial net per diem debtors, even if they owned more cars than they needed. Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type. Accordingly, if the proposed legislation were approved, the Commission would exercise *extreme caution* in setting incentive per diem rates. We recognize that an indiscriminate increase in the number of freight cars would result in an uneconomic surplus of cars of various types and would result in wasteful transportation practices.

It is open to serious question whether the Commission's plan for producing "a steady * * * flow of funds to creditor per diem roads" for the purpose of acquiring plain box cars will result in a car supply adequate to meet the needs of commerce. Rather, we think that "extreme caution" should have been utilized here so that the needs of all shippers and all carriers could have been given the necessary consideration.

And the shippers, whose cries have caused such haste here, must play a part in the hearings before more judicious conclusions are reached. For, in considering incentives, what thought has the Commission given to the shipper or consignee whose failure to promptly load, unload, or release cars is a major cause of car supply problems.

There are other problems with the Interim Report to be considered. We point out that there is great danger in engaging in too many assumptions which have not been tested by the parties directly involved. Here we refer to the Commission's "tentative approach to the *appropriate amount* of incentive."[8] The approach simply is not understood by this carrier, and, once again, it appears not to take into considera-

[8] Interim Report, sheets 6–10.

tion the needs of all carriers. Instead, it favors the carriers and shippers whose basic needs are unequipped box cars. It is not enough to say that the approach is "experimental," for this experiment could quickly cause irreparable harm.

In another area of the report, there is no apparent reason to support the conclusion * that a "6-month application of the incentive charges should bring distinct economic benefits." The SCL stands to lose a considerable amount of money, and its long-term car supply considerations would be affected adversely by the Commission's short-term experiment. It is very plain to this railroad that someone else will receive the "distinct economic benefits" at our expense, and to the detriment of our car supply program. This result, in turn, will be harmful to many shippers and receivers in the Southeast who appear not to have been considered by the Commission in its Interim Report.

CONCLUSIONS

The SCL recognizes that there exist many problems with respect to car supply. But, tentative, unreasoned, and unsupported requirements result only in inadequate and inequitable answers to the problem. Experiments are dangerous, not only because they can be harmful to the economy of carriers, but because they offer an insecure base upon which to make long-term arrangements and investments in expensive rail cars.

For the reasons stated, therefore, it is the position of the SCL that the "tentative conclusions" of the Commission cannot be supported by facts, that the carriers are entitled by law to a hearing on the vital

* Interim Report, sheet 10.

subject of incentive per diem charges, and that the interim order must be set aside until a proper record can be made.

Respectfully submitted,

RICHARD A. HOLLANDER,
Attorney for Seaboard Coast Line Railroad Company.

MARCH 16, 1970.

APPENDIX B TO DISTRICT COURT OPINION
BEFORE THE INTERSTATE COMMERCE COMMISSION

(Ex Parte No. 252 (Sub No. 1) Incentive Per Diem Charges—1969)

REPRESENTATIONS OF FLORIDA EAST COAST RAILWAY COMPANY AND REQUEST FOR ORAL HEARING AND ORAL ARGUMENT

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EUGENE M. MALKIN,
Attorneys for Florida East Coast Railway Company.

MARCH 17, 1970.

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BEFORE THE INTERSTATE COMMERCE COMMISSION

(Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem Charges—1969)

REPRESENTATIONS OF FLORIDA EAST COAST RAILWAY COMPANY AND REQUEST FOR ORAL HEARING AND ORAL ARGUMENT

I. PRELIMINARY STATEMENT

By interim report and order served December 22, 1969, the Commission issued tentative findings and conclusions regarding the adequacy of plain box cars and the necessity for prescribing an incentive charge to be added to the basic per diem charges paid by railroads for use of plain box cars owned by other roads. The report proposes a schedule of incentive charges applicable to plain box cars during the period September 1 through February 28 of each year. The Commission's order, as amended, directs interested parties to file initial verified statements, briefs, or other responses to the interim report on or before March 17, 1970.

These representations and request for oral hearing and oral argument are submitted on behalf of the Florida East Coast Railway Company (FEC). Attached hereto and submitted on behalf of FEC are verified statements of E. L. Masters, Comptroller-Secretary of FEC, and R. P. Taylor, Assistant to the Vice President of FEC.

II. SUMMARY OF THE POSITION OF FEC

1. If the Commission decides to impose the proposed incentive charges on plain box cars, FEC should be exempted from payment of the charge because (a) FEC is a terminating railroad, (b) FEC has a surplus of plain box cars on its lines and the acquisition of additional plain box cars by FEC would be a wasteful and improvident use of resources, (c) operating practices of FEC assure efficient use and the prompt return of plain box cars received from connecting lines, and (d) imposition of the proposed incentive per diem charges would, in addition to the recently approved per diem-mileage charges, impose an unreasonable cost burden on traffic handled in plain box cars and on the entire operation of FEC.

The attached verified statements of Mr. Masters and Mr. Taylor establish, among other facts:

a. FEC can not efficiently use a larger number of plain box cars than those presently owned by FEC.

b. FEC consistently terminates a substantially higher percentage of interline carloads of freight, including freight moving in plain box cars, than it originates.

c. FEC can not load the plain box cars now on its lines; three of every four plain box cars are returned empty to connecting lines for lack of suitable revenue freight for such equipment.

d. FEC ownership of additional plain box cars would result in greater inefficiency in the use of box cars.

e. FEC now handles box cars promptly and efficiently and with a minimum of delay in the return of the cars to connecting lines; the imposition of an incentive charge would not produce a more prompt or efficient movement of cars by FEC.

f. FEC, because of operating conditions and geographic location, can not avoid being a substantial per diem debtor.

g. The proposed incentive charges, if applied to FEC's operations during the four-month period, September 1, 1969 to December 31, 1969, would have increased equipment rents by $108,951.57, an average of $27,000.00 each month.

2. FEC is opposed to the imposition of incentive charges on plain box cars and believes that an attempt to impose such charges on the basis of the evidence in this proceeding and the interim report of the Commission would be unlawful.

Imposition of the proposed incentive charges on plain box cars, without restructuring the rates, divisions, and demurrage charges to take account of the cost burden placed on terminating carriers, such as FEC, would be unlawful and would present substantial constitutional questions.

Imposition of the proposed incentive per diem charges can not be supported by the evidence in this proceeding. The data relied upon by the Commission in the interim report does not establish the existence of box car shortages or that the proposed incentive charge would be effective in reducing claimed deficiencies in the availability of box cars for shipper loadings. The conclusions in the interim report appear to contradict conclusions respecting the adequacy of existing car fleets and the availability of cars for loading expressed by the Commission at other places on the same record of railroad performance.

A hearing is essential as a matter of law under section 1(14)(a) of the Act to develop an adequate record on the basic factual issues to be resolved by the Commission. FEC, accordingly, requests an oral hearing and oral argument before the Commission.

III. FEC SHOULD BE EXEMPTED FROM INCENTIVE PER DIEM CHARGES

A. Congress provided in section 1(14)(a) an exemption from incentive charges for terminating lines

Section 1(14)(a), as amended, provides that "The Commission . . . may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest." The legislative history of Public Law 89–430, now section 1(14)(a), establishes that this provision was intended to authorize an exemption from incentive per diem charges for carriers, such as the FEC, terminating a substantially higher percentage of interline traffic than they originate. During the course of the hearings on Senate Bill No. 1098, later enacted as Public Law 89–430, it was repeatedly indicated that a railroad meets its common carrier responsibilities when it owns or otherwise provides freight cars of various types, which, together with foreign cars used in accordance with the car service rules, are sufficient in number to protect the loads it originates.[1]

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[1] See Statements of Chairman Webb of the Commission, *Hearings Before Freight Car Shortage Subcommittee of the Committee on Commerce*, United States Senate, 89th Cong., 1st Sess., Ser. No. 89–23, p. 13 (1965); and *Hearings Before Committee on Interstate and Foreign Commerce*, House of Representatives, 89th Cong., 1st Sess., Ser. No. 89–26 (1965), at page 44:

> It is extremely difficult to determine whether the number of cars owned by a particular carrier represents a fair and equitable contribution to the total number required for a reasonably adequate national supply.
>
> In general, however, it would seem that each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in number to protect the loadings it originates.

S. 1098 provided, as passed by the Senate, that the Commission was authorized to make any incentive element in per diem charges inapplicable "(1) to carriers determined by the Commission as owning an adequate number of freight cars to meet their responsibilities to the needs of commerce and the national defense; (2) to carriers which terminate a substantially higher percentage of interline traffic than they originate; (3) to types of freight cars the supply of which the Commission finds to be adequate; and (4) to such other cases or circumstances as the Commission finds to be in the public interest."[2] The House of Representatives substituted for this explicit provision the more general language now found in section 1(14)(a), authorizing exemption of any group of carriers if found to be in the national interest.[3] It is clear, however, that the change in language was not intended to remove the exemption of these groups of carriers from any incentive per diem charge. Debate on the bill in the House pointed out that the

[2] 111 Cong. Rec. 14827 (1965).

[3] With respect to the Senate Bill, Chairman Webb of the Commission, testifying before the House Committee on Inter-State and Foreign Commerce, stated:

> The Commission did not object to the Senate Amendment because all the factors specified therein would have been considered under the language of the bill, as introduced, and would be considered, of course, under the language of H.R. 7165. *Hearings Before the House*, *supra*, p. 5 n. 1.

Commission [4] was to make exemptions on the basis of the factors specified in the Senate bill.[5]

The Senate acceded to the language used by the House. During Senate consideration of the amended bill, it was made clear that the revised language had not eliminated the objectives of the original bill and

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[4] The comment of Commissioner William H. Tucker, the Commission's Acting Chairman of the Committee on Legislation, responding to a final proposed House amendment to S. 1653 designed to preclude any carrier exempted from incentive per diem payment from receiving payment, is particularly illuminating. Writing in opposition to the Kornegay amendment, Commissioner Tucker said, in part:

> . . . Valid reasons may warrant a carrier being made exempt from paying an incentive element and yet remain entitled to receive an incentive element for its own cars. This may be because of the carrier's contribution to the car fleet, the type of carrier involved, or other considerations which may be developed during the hearing.
>
> We also observe that the incentive element is intended not only to encourage carriers owning an adequate supply of cars to build more cars, but to provide those carriers owning an adequate supply a sufficient return to encourage them to continue to build more cars. Under the suggested proposed amendment, however, it would appear that a carrier exempted from paying the incentive element because it has an adequate supply of cars, would also be precluded from receiving the incentive element necessary to encourage it to contribute to the freight car supply. 112 Cong. Rec. 9961 (1966).

The Kornegay amendment was later defeated, leaving the more general language intact. *Id.* at 9964.

[5] The Chairman of the House Interstate and Foreign Commerce Committee stated:

> . . . This provision enables the Commission to make exemptions from paying an incentive by class of carrier, and permits the Commission to consider the several factors specifically authorized in the Senate Bill. 112 Cong. Rec. 9946 (1966).

He further stated during debate:

> . . . all this does to the House (sic) version is just sharpens up the objectives and aims. . . . It does give to the Interstate Commerce Commission the opportunity, after hearings, to exempt certain railroads. This is intended for railroads in the gentleman's area [Massachusetts], as the gentleman knows. *Id.* at 9962.

that the statute was to be administered as to exempt from any incentive per diem terminating railroads and those railroads with an adequate supply of cars.[4]

Senator Pastore later asked Senator Magnuson, Chairman of the Senate Commerce Committee, whether the bill, as changed by the House, retained the provision involving a terminal line like the New Haven. Senator Magnuson replied, "That is in the bill." *Ibid.*

The Commission's interim report does not consider whether any rail carrier or class of rail carriers should be exempted from payment of the proposed incentive charges. A final determination to impose incentive charges will require Commission consideration and decision on this point. The verified statements of

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[4] Senator Cotton said during Senate consideration of the bill, as changed by the House of Representatives:

> The aim of these provisions of the Senate Bill, which I had a part in suggesting, was to assure reasonable and fair consideration of the special problems arising in the industry, including the problem of terminating railroads, whose per diem charges are not related to the number of boxcars they may own.
>
> In the bill before us today, as it has come back from the House of Representatives, the four types of circumstances spelled out in the Senate bill are not directly listed. It is clear, however, that all the factors listed in the Senate bill still have to be considered by the Interstate Commerce Commission, and the Commission would have the power, and the duty, not to apply the incentive element to any group of carriers, and even a single carrier, where those four circumstances, or any other circumstances, made it in the National interest to do so.
>
> * * * * *
>
> I am supporting these amendments with the understanding that it is clear from the extensive legislative history of this bill that it gives the Commission the power, and the responsibility to exempt from the incentive per diem those carriers who terminate a substantially higher percentage of interline traffic than they originate. I am confident that the Commission recognizes its responsibilities in this respect and that the intent of the Congress will be fully implemented. 112 Cong. Rec. 10250–10251. (1966).

Mr. Masters and Mr. Taylor contain detailed evidence supporting FEC's exemption from any incentive charge. We set out below, in summary fashion, the factors establishing that FEC should be exempted from any incentive per diem charge.

B. FEC is a terminating line with a surplus of plain box cars

FEC is a terminating railroad because of geographic location, the consist of its traffic, and the operating conditions unique to its lines.

FEC's main line parallels the east coast of Florida between Jacksonville and Miami. FEC connects at Jacksonville with the Southern Railway and Seaboard Coast Line.

In the six-month period, September 1, 1968 through February 28, 1969, FEC terminated 47,118 carloads of revenue freight but originated only 24,731 carloads. The ratio of plain box cars loaded to those terminated was even lower during this period—12,180 terminated and 3,402 loaded. During the 17-month period beginning September 1, 1968 and ending January 31, 1970, FEC terminated 33,301 plain box cars and loaded only 8,733. Virtually all loaded box cars moved by FEC are received at Jacksonville for southbound movement and are returned empty to Jacksonville. Thus, in January and February 1970, FEC received from connections 3,586 plain box cars but delivered to connections empty 2,527 plain box cars.

FEC's position as a terminating road is further affected by the fact that most of the traffic received from connecting lines terminates at the south end of the line—the area of West Palm Beach and south, including Miami. For instance, of 87,445 cars received from connections in the year 1969 destined to all stations served by FEC, 61,753 were received at Jackson-

ville for termination at West Palm Beach and south, including Miami. As a result, FEC is compelled to move foreign interline cars virtually the entire length of the Florida peninsula and the return to Jacksonville empty. FEC's ratio of empty to loaded car-miles reflects this operating situation. In 1969, the ratio was 94 percent. The ratio has been 90 percent or more in every year since 1962.

FEC is a terminating line because the products shipped from the east coast of Florida, the area served by the lines of FEC, are generally not suitable for movement in the equipment used to transport incoming traffic, in addition to the fact that the southbound volume of traffic exceeds northbound shipments. During 1969, FEC received from connections 87,445 carloads of revenue freight, while originating and delivering to connections 48,359 carloads. Of the 48,359 carloads delivered to connections, 37,808 cars were farm produce requiring movement in refrigerator equipment. The freight received from connections, on the other hand, required box, gondola, hopper, and flat cars not suitable for farm produce originated by FEC.

Acquisition by FEC of any substantial number of box cars under these operating conditions is useless and an improvident use of resources. Additional plain box car ownership would result in either non-use of the equipment or further inflation of empty miles of car use. Imposition of the proposed incentive charge would not, under these circumstances, provide an incentive for the addition of plain box cars by the FEC.

C. FEC moves plain box cars with dispatch and returns foreign cars to connecting lines promptly

FEC has been successful in moving foreign cars efficiently and in holding the time plain box cars of

foreign ownership spend on line to a minimum. The train and switching schedules, the car distribution and control program, and other operating procedures used by FEC to expedite movement of cars are detailed in Mr. Taylor's verified statement. FEC's average time on line (from date received to date of return to connections) of plain box cars is less than seven days. On multi-level rack cars, where there is no delay in unloading by the consignees, FEC has consistently achieved the highest average number of miles per day of any railroad in the United States. Any significant reduction in the time plain box cars remain on FEC's line must come from a reduction in the unloading time of consignees.[7] It is certain that the imposition of an incentive charge on plain box cars in the amounts proposed by the Commission or in any other amount to be paid by FEC will not and can not produce a more efficient use of plain box cars by FEC.

D. Incentive charges would impose an unreasonable burden on FEC

FEC is and has always been a substantial per diem debtor. In 1969, net car hire payable by FEC was $1,777,417, approximately 5½ percent of total railway operating revenues. If the proposed scale of incentive charges had been applied to the plain box cars handled by FEC during the months of September through December 1969, FEC car hire would have been increased $108,951.57, an average of $27,000 per month. This is a significant increase in the cost of handling freight moving in plain box cars. This pro-

[7] Present rules generally allow 48 hours free time for unloading on domestic traffic and five days free time on port traffic. FEC serves ports at Miami, Fort Lauderdale (Everglades), Palm Beach, and Fort Pierce.

posed incentive charge, moreover, will in the future be added to increased per diem charges prescribed by the Commission in Docket No. 31358. If these increased per diem-mileage charges had been effective during the months of August through December 1969, the basic per diem charge for plain box cars would have averaged $5,000 higher per month.[8]

FEC has not had adequate time to determine the extent to which the additional cost of the proposed incentive charge would make traffic moving in plain box cars non-compensatory at existing tariff rates and charges. One fact, however, is certain. The proposed incentive per diem alone, applied over a period of six months, would exceed the net railway income of FEC in 1967 and 1968.

IV. NEITHER THE INTERIM REPORT NOR THE EVIDENCE BEFORE THE COMMISSION ESTABLISHES THAT AN INCENTIVE CHARGE IS JUSTIFIED OR THAT THE PROPOSED CHARGE WILL ACHIEVE THE OBJECTIVES SPECIFIED IN THE ACT

The conclusions as to the adequacy of the supply of plain box cars in the interim report are based upon data reported by rail carriers in response to directions and forms furnished by the Commission. The study is described in Appendix A and the data obtained is summarized in Appendices C and D of the interim report. The information furnished to the

[8] Application of the per diem charges prescribed in Docket No. 31358 to all types of cars including plain box cars handled by FEC during September–December 1969 results in an average monthly increase for FEC of $8,000 in per diem costs, an increase of 4 to 5 percent in per diem charges. Little, if any, of the increased cost will be offset by increased receipts from foreign line use of FEC cars because of the type of car owned by FEC and the short-haul movements in which FEC cars now participate.

Commission in this study also formed the basis of a report made by the Commission to the Senate Commerce Committee in May 1969. In that report, the then Chairman of the Commission stated that an analysis of the data showed:

> . . . [E]very zone has had available daily a supply of every type which exceeded demands [by shippers], represented by orders on hand at the beginning of the day, and by orders requesting placement on the same day. In most cases, the daily receipt of cars has exceeded such orders and the cars on hand at the beginning of the day substantially exceed current demands.[9]

The Chairman further characterized the current shortage not as a lack of an adequate supply, but rather as "a failure in actually placing available cars in response to a shipper request." [10]

In these circumstances, the number of plain box cars owned by railroads can not be found the cause of any failure promptly to supply cars to shippers. More importantly, there is no factual basis for a conclusion that an increase in the number of plain box cars would result in the prompt placement of box cars at stations reporting an inability to furnish all cars on the day ordered. Additional cars would undoubtedly fall into existing patterns of dislocation. A supply of box cars adequate to make all placements on the day ordered at all stations in the United States at all times of the year would require astronomical numbers of cars. Such level of ownership would be wasteful and inefficient in the extreme. It is doubtful,

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[9] See Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, *Railroad Freight Car Shortage Before Committee on Commerce*, United States Senate, May 13, 1969, p. 8.

[10] *Id.*, Statement at p. 8.

to say the least, if the railroad industry could finance car ownership at such a level. The enormous cost of service that such a level of ownership would impose on commodities moving in box cars could never be justified.

The interim report treats the failure to place a box car on the day ordered as a deficiency. This is an unreasonable standard. The Commission's report to the Senate Commerce Committee pointed out the difficulties in this standard of performance. Chairman Brown told the Senate Committee:

> Reliance on these statistics for a measure of any inadequacy of car supply, of course, involves an assumption that it is reasonable to require the railroads to fill every order on the day for which the cars are requested and that a shipper who requests prompter service, no matter how preemptory that request may be in relation to the demands of all shippers for the same type of car, is entitled to such service. This assumption may be unwarranted, and the study provides data by means of which allowance can be made for the effect of the assumption.[11]
>
> * * * * *
>
> . . . the data seem to warrant the conclusion that, with the present efficiency of car distribution, delay in filling orders within two days after they are received so far as orders requesting placement on the day they are filed or the first day thereafter should not be considered excessive.[12]

The members of the Commission's own staff with experience in car service matters have repeatedly stated under oath that is unreasonable to expect car-

[11] *Id.*, Statement at p. 14.

[12] *Id.*, Statement at pp. 16–17.

riers to place cars within 24 hours of receipt of an order, particularly in periods of peak demand.[13]

Mr. Taylor's verified statement, attached to these representations, details the practical operating problems that may and do prevent placing a car at a shipper's location for loading on the day the car is ordered, even though the carrier has an ample supply of suitable equipment. This evidence establishes that, at least for the FEC, the data obtained in the Commission's study as to "deficiency" in placement can not be related to the adequacy of the number of cars owned by rail carriers.

V. IMPOSITION OF INCENTIVE CHARGES WITHOUT RESTRUCTURING EXISTING RATES AND DIVISIONS WOULD BE UNLAWFUL AND RAISE SERIOUS CONSTITUTIONAL ISSUES

Imposition of the proposed incentive charge would require substantial changes in the existing rates, divisions, and demurrage charges on traffic moving in plain box cars. Substantial increases in the FEC revenues for handling such traffic would be essential.

The heavy burden that an incentive charge might place upon the terminating carriers was recognized during the Congressional hearings on the present section 1(14)(a). Testifying on S. 1098, Chairman Webb observed that, to the extent incentive per diem increased the burden upon terminating carriers, such as the Boston and Maine and New Haven, that burden could be offset through an appropriate adjustment of the divisions between carriers.[14]

FEC recognizes that any proposal to modify existing rates or divisions of revenue would present a number of important issues. For example, may division of

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[13] See Ex Parte No. 241, testimony of Witness Kline, Tr. 356–359, 1234, 1236.

[14] *Hearings Before the Senate*, *supra*, p. 5 n. 1.

revenue between carriers be adjusted to permit recovery of the increased per diem incurred without actualy nullifying the incentive intended by the Act? Are incentive per diem payments to be considered as part of the operating cost of a rail carrier for purposes of rate regulation and, accordingly, considered as justification for an increase in rates?

This incentive per diem proceeding rests upon the proposition that the FEC is responsible for a share of the national demand for freight cars. The national demand for cars is the total of the demands made on all railroads. Demand for cars to transport any commodity depends upon a number of factors, including the rate established by the railroad or railroads involved vis-a-vis other modes of transport. Competition from other carriers, and from other modes of transportation, have led to reductions that may produce noncompensatory rates unless the traffic is moved in newly designed cars rather than standard box cars.[11] The result is that such railroads can and do create a requirement for additional box cars through rate adjustments. Demand for cars and the need for additional cars to move traffic tendered to railroads may be affected by operating practices of the carriers. FEC has no way to control or veto the rates for the movement of shipments in which FEC does not participate. Nor does FEC control the practices of other lines affecting the use of and need for cars. How then can FEC be responsible for supplying a share of the equipment made necessary by these rate practices?

Unless exempted from the imposition of any incentive per diem, much of the interline traffic now han-

[11] See, *e.g.*, I&S Docket No. 7656, *Grain In Multiple-Car Shipments—River Crossings to the South;* and the application of reduced rates to movement of grain in conventional box cars as well as in jumbo hopper cars.

dled by FEC will be transported at a loss. As a common carrier under section 1 of the Act, FEC is obligated to provide transportation service upon reasonable request and participate in through routes. FEC may not be able, therefore, to decline to transport over its lines loaded cars which carry an incentive or an increased per diem rate. The Act, however, specifies that a railroad shall be permitted to charge and receive just compensation for services required to be performed. Imposition of incentive per diem, at a level which is either in excess of just and reasonable compensation to the car owner or results in the receipt by FEC of less than just compensation for services performed, would raise substantial questions affecting the validity of this proceeding and the underlying statute.

VI. REQUEST FOR ORAL HEARING AND ORAL ARGUMENT

Oral hearing and oral argument are required to develop an adequate record for disposition of this proceeding and to comply with applicable statutes.

Section 1(14)(a) of the Act authorizes the Commission "after hearing" to fix the compensation, including elements of incentive, paid by railroads for use of cars owned by other roads. The legislative history of that section establishes that Congress contemplated unrestricted public hearings.[16] Moreover, since Commission imposition of an incentive charge involves a determination that is "required by statute to be determined on the record after opportunity for agency hearing,"[17] an oral hearing is required by section 7

[16] 112 Cong. Rec. 9945, 9953–54 (1965).

[17] 5 U.S.C. § 554(a).

of the Administrative Procedure Act.[18] Section 7 of the Administrative Procedure Act further provides that the proponent of the rate or order has the burden of proof. That burden is not discharged by an "interim" Commission report containing evidentiary findings and conclusions based upon data collected from the individual railroads. Adversely affected railroads must be provided an opportunity to test the factual claims and the reliability of the underlying data through cross-examination.

FEC expects at an oral hearing to compel the attendance of those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex Parte No. 252.[19] FEC expects to establish, by cross-examination of such persons, the following facts, among others:

a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.

b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.

c. No computation has been or can be made on the evidence before the Commission in this

[18] 5 U.S.C. § 556(d), in pertinent part, provides: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

[19] A list of such persons will be supplied by FEC as required by Commission procedures in advance of the hearing.

proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.

d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

CONCLUSION

FEC submits that the proposed incentive charge should not be imposed or, alternatively, FEC should be exempted from any incentive charge prescribed in this proceeding.

Respectfully submitted,

A. ALVIS LAYNE,
EUGENE M. MALKIN,
Attorneys for Florida East Coast Railway Company.

MARCH 17, 1970.

NOTE.—(Supporting Statements and Statistical Data have been omitted by the Court from this document.)

APPENDIX B

United States District Court Middle District of Florida, Jacksonville Division

(No. 70-574-Civ-J)

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, FLORIDA EAST COAST BUILDING, ST. AUGUSTINE, FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

(No. 70-577-Civ-J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

ORDER MODIFYING JUDGMENT

IT IS ORDERED by the Court:

1. The Motion to Modify Judgment pending Appeal (filed April 5, 1971) of the United States and the Interstate Commerce Commission is granted to the extent that the plaintiffs are ordered to continue to maintain the accounting records described in the August 31, 1970, order of this court until such time as the Supreme Court of the United States shall dispose of this cause on appeal or until that Court shall modify or dissolve this order, whichever occurs first; provided

however that if defendants fail to take a timely appeal from this court's order of February 18, 1971, the aforesaid requirement that plaintiffs keep and maintain accounting records shall terminate as of April 17, 1971.

2. Said Motion to Modify Judgment Pending Appeal is in all other respects denied.

DONE and ORDERED at Jacksonville, Florida, this 14th day of April, 1971.

BRYAN SIMPSON,
United States Circuit Judge.
WM. A. MCRAE, JR.,
United States District Judge.
CHARLES R. SCOTT,
United States District Judge.

APPENDIX C

30506

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided December 12, 1969

Upon investigation, certain tentative conclusions reached regarding the incentive element to be added to the basic per diem charges paid by railroads for the use of boxcars owned by other railroads. Appropriate rules and regulations embodying those provisional conclusions proposed. All parties and other interested persons are invited to file further statements of facts, views, and arguments respecting these tentative conclusions and the proposed rules and regulations.

Appearances as shown in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, and in addition *Richard M. Freeman, F. J. Melia, George M. Onken, R. H. Stahlheber,* and *James L. Tapley* for interested parties.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

This interim report reflects our tentative conclusions, reached pursuant to section 1(14)(a) of the Interstate Commerce Act, as to the adequacy of the national freight car supply and a provisional judgment regarding the form and amount of an incentive charge that will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. Interested persons will be given the opportunity to present evidence and arguments with respect to these interim conclusions.

BACKGROUND

This investigation was instituted on our own motion primarily under section 1(14)(a) of the Interstate Commerce Act as amended by Public Law 89-430 (80 Stat. 168). That amendment, effective September 1, 1966, requires that—

In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

The proceeding was initiated by a notice of proposed rulemaking of December 15, 1967, following the earlier dismissal of the proceeding in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, decided October 3, 1967. The notice, published at 32 F. R. 20987, named as respondents all common carriers by railroad subject to the Interstate Commerce Act, directed the Bureau of Enforcement of this Commission to participate, and established procedures for the compilation of data during 1968 which we stated we would need in the cited decision.

At the time we issued the prior report, the only information which was available to us directly bearing on the adequacy of the national car supply was contained in the so-called CS-44 reports of member railroads to the Association of American Railroads and a 1-month study made by the railroads in connection with the proceedings in Ex Parte No. 241.[1] The CS-44 reports list as shortages the cars ordered placed for loading in excess of the number actually placed, provided the orders remain unfilled for 24 hours prior to 6 p.m. of the reporting day. The CS-44 reports also list as surplus the cars which are in excess of those needed to fill existing or anticipated orders for the next day. The railroads expressed reservations and criticisms of these data, leading us to find in the prior report that the data in those reports could be given little weight.

We, therefore, recognized in our prior report a need for data systematically collected on scientific bases which would show the

[1] See *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264.

demand for railroad freight cars, the supply of cars on hand to meet such demand, and the manner and extent to which the demand was met. We then saw, for example, only an unsatisfied demand for cars without any indication of the extent to which surplus cars could be used to meet the unsatisfied demand. We expressed our concern with the paucity of data then before us and stated that, "An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types." (332 I.C.C. at 15.) We stated further that we needed information necessary to make a decision on the quantum of an incentive charge. To that end this proceeding was initiated.

In the notice of proposed rulemaking of December 15, 1967, we required all common carriers by railroad subject to the act to participate in a study of car demand and supply conditions throughout the country. The manner in which the study was conducted, and the results thereof, are described in appendix A to this report. The data thus developed are persuasive that a shortage in the supply of plain boxcars is a significant factor in the inability of many railroads to fill shippers' car orders. The data show that there are definite limits to better utilization of the existing fleet of cars within each region; over a period of many months in 1968, the shortage in supply of cars probably could not have been relieved by known methods of greater utilization of the car supply.

ROLE OF INCENTIVE PER DIEM

In the 1966 amendment to section 1(14)(a) of the act, Congress required us to determine whether incentive per diem has a role in the adequacy of the national freight car supply. By "incentive" the statute refers to a rate of return beyond mere compensation for risk taken. It refers to compensation for risks that might within reason have been taken for the promise of higher returns. Given such a return, railroad management should accord at least some consideration to freight cars as one alternative form of investment.

In the prior report, we hesitated to adopt an interim incentive per diem that we found would not bring about any change in operating practices or in any commitment for the purchase of additional equipment. On the other hand, mindful of the large regional car surpluses that existed simultaneously with reported shortages, it was further noted that incentive per diem must take into account

a reasonable prospect of efficient year-round use of equipment and avoid encouraging uneconomical investment in excess capacity.

We then did not stress the continuing heavy demand for the standard boxcar. Shipper need for the standard boxcar still far exceeds the need for any other type car. The present data show that despite the introduction of new types of equipment, demand for the standard boxcar cannot be satisfied from existing sources of equipment for at least half the calendar year. A long-term incentive per diem does not seem likely to add large numbers of boxcars to the national fleet in the near future; but it may at least alleviate the problem of car shortages over a period of several years.

An incentive per diem applicable on boxcars during the fall and winter, in our view, should tend to speed up the use and movement of cars in those periods and should encourage the return of cars to their owners. If it fails in this regard, such a 6-month application of the incentive element should, we think, nevertheless produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars. Significantly, many of the creditor roads are in the Midwest, the same region that displays the heaviest concentration of deficiencies[2] for half the year. If the incentive were not effective in returning cars to their owners, and thereby relieving the shortages in the Midwest, the railroads in that zone would become the beneficiaries of funds for the future purchase of additional plain boxcars.

The incentive might tend to encourage the acquisition of additional boxcars by carriers in all zones. The debtor per diem roads would have the choice under the incentive charge either to purchase more cars (and return foreign cars more promptly) or to pay an incentive charge that would permit the creditor roads to purchase more cars. In either event, we are of the tentative view that the incentive charge should operate in a manner fully consistent with the language and purposes of section 1(14)(a).

To remove some of the doubt regarding the effect of an incentive charge on car supply, we now propose that incentive funds be "earmarked"—a requirement described later herein—as a measure of assurance that increased per diem credits resulting from the incentive eventually find their way into new cars. Admittedly, as we said with regard to one aspect of basic per diem, freight

[2] The use of this term to mean a failure to fill orders and an *ad hoc* definition of "shortage" for the purpose of analysis are set forth in appendix A.

cars are built to earn revenue and not per diem money. So saying, however, we cannot at the same time exclude the possibility underlying section 1(14)(a), that increases in per diem charges will help the roads acquire the cars they need to earn the revenue.

We emphasize that the proposed incentive charges are both tentative and experimental. Before becoming effective, they are open to comment and criticism, including oral hearing should the circumstances warrant. After becoming effective, they may be modified as future circumstances require. Here, as with basic per diem, we envision an open-ended proceeding, whereby studies, suggestions, and proposed changes may be submitted as the charges are tested in the light of actual experience.

Amount of incentive per diem.–Tables showing the incentive per diem charges here proposed are set forth in the order appended to this report. The relation of this charge to the basic per diem time charges prescribed by us in *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, is shown in appendix B to this report.

Our tentative approach to the appropriate amount of incentive assumes that the overall rate of return earned by nonregulated, higher risk corporations in a recent year should, if applied to the per diem charges, produce an incentive among the railroads to consider investment on a regular and increasing basis in the national boxcar fleet. Rather than invest in a nontransportation enterprise, railroads obtaining an incentive per diem charge should likely direct attention and funds to the supply of plain boxcars.

A model for the construction of such a rate of return figure may be found in the balance sheet and income figures in "Statistics of Income," compiled by the United States Department of the Treasury, Internal Revenue Service (IRS).[3] Under section 6108 of the Internal Revenue Code, IRS is required to compile annual statistics from the tax returns of corporations. Beginning with "Statistics of Income" for 1951, the corporate data have been derived from a stratified sample, selected before audit, of returns of domestic and resident foreign corporations not exempt from income tax. Data are obtained for all corporations, manufacturing and nonmanufacturing and whether or not they have taxable income. The IRS universe includes all corporations, as defined by the Internal Revenue Code, organized for profitmaking purposes.

[3]The data are also available in *Source Book, Statistics of Income, 1966*, compiled by the United States Treasury Department, Internal Revenue Service, Statistics Division.

For 1966, the latest available year, IRS reported on the returns of 1,468,725 corporations; of these, 939,846 reported net income. The composite net income before taxes available to service the capital structure of all the reporting corporations was 12.4 percent in 1966. After taxes the net income of these same corporations comprised the much lower rate of return on net assets of 8.9 percent, as shown in the table below.

RATE OF RETURN ON NET ASSETS, ALL CORPORATIONS—1966

	In billions
1. Total assets	$1,844.1
2. Less: Accounts payable	$ 99.2
3. Other current liabilities	618.5
4. Other liabilities	211.8
5. Total deductions	929.5
6. Net assets	914.6
7. Net income before taxes and interest	113.8
8. Federal income taxes after investment credit	32.4
9. Net income	81.4
10. Return on net assets before taxes (Line 7 ÷ line 6)	12.4 percent
11. Return on net assets after taxes (Line 9 ÷ line 6)	8.9 percent

The IRS data, insofar as they reflect the operation of railroads, reveal that on the foregoing basis the railroad return on net assets before taxes in 1966 was 3.8 percent.

Upon consideration of the IRS figures, the higher interest rates of the present period, the return figures earned in the more current years, the generally lower actual tax rate paid by the railroad industry in comparison with corporations in general,[4] and the differing purposes as between basic and incentive per diem, we provisionally conclude that the addition of an incentive element to the basic charges should produce an annual 12-percent rate of return on the investment in general service, unequipped boxcars in lieu of the 6-percent rate of return we included in the basic charges alone.

The dollar value of the incentive return element is computed in appendix B, page 3. The computation is premised on a 30-year life of a boxcar with a 10-percent salvage value and a cor-

[4]In 1966 the class I railroads paid $186.3 million in Federal income taxes and surtaxes from $1,090 million of net income. In 1968, the class I railroads paid $66.1 million in Federal income taxes and surtaxes from $630.6 million of net income.

responding annual depreciation rate of 3 percent. The net investment per $1,000, therefore, declines by 3 percent per year in the appendix; and the incentive return of 6 percent is computed on the basis of the declining investment.

Each 5 years of incentive return are then grouped and averaged on a per-year basis (the total incentive over 5 years divided by 5), and then on a per-day basis for 6 months (the annual average divided by 171 days).[5] The reasons for employing a 6-month factor are described later. Suffice it here to say that the computation provides an incentive per diem charge collectible over 6 months for cars of various ages, a very useful tool that is employed in appendix B, pages 1 and 2, to develop the incentive per diem charge set forth in the attached order. Thus, in appendix B, page 3, for a car originally costing $1,000 that is now 16 to 20 years old (group D), the average incentive return element per day will be 16.67 cents. The per-day charge is then carried over to the tables on pages 1 and 2, and forms the multiplier for the entire incentive column under "group D" in the attached order.[6]

To obtain the incentive charge for a car in which the cost exceeds $41,000 it is necessary only to multiply the incentive charge per $1,000 shown in appendix B, page 3, for the applicable age group times an amount representing the midpoint of the cost bracket in which the car falls. For example, the incentive charge for a group B car in the $47,000-49,000 cost bracket would be computed by multiplying 27.19 cents times 48.

Six-month application of the charge.– The basic perdiem rates, providing compensation for one carrier's use of the cars of another, apply throughout the year. The rule set forth in the appended order applies the incentive charge only during the fall and winter months of each year.

As explained in appendix A to this report, the heavy-loading period extended over a large number of months in 1968. In some years, it has been longer. The carriers cannot be expected to make sufficient use of their surplus cars to meet shipper demand in this period, and, accordingly, a shortage may be said to exist within the meaning of the statute in such period, which shortage, we believe, may be alleviated by incentive charges.

[5] Cars that are over 30 years old have been depreciated down to their salvage value of 10 percent. The annual average incentive return per $1,000 of original investment is therefore $6, or 3.51 cents per day over the 6 months in which the incentive charge is collected.

[6] Under group D, the incentive return element per $1,000 of investment is multiplied by the midnumber of thousands of dollars of original cost in each cost bracket; for example, for the $13-15,000 bracket (group D, line 8) the table multiplies 14 times 16.67 cents to obtain the incentive return element.

A 6-month application of the incentive charges should bring distinct economic benefits. The IRS data earlier discussed suggest an overall 12-percent rate of return as the basis for an incentive charge. Such a rate of return represents a doubling of the rate of return applicable under the basic per diem charges. The application of the incentive charge during the heavy-loading period permits us to place the burden of paying the heavier charge on the debtor roads during the period of heaviest demand and hence during the period of their greatest ability to pay.

By bunching the incentive element into a 6-month period, the effective rate of return in that period will be 18 percent, if the rate of return throughout the year is to be 12 percent. The computation underlying this statement is the following:

Rate of return during slack period (or 1/2 year times 6 percent)	= 3 percent
+ Rate of return during peak period (or 1/2 year times 18 percent)	= 9 percent
Annual rate of return	12 percent

The per diem charges in the peak period resulting from the use of an 18-percent figure should stimulate the faster return of cars to their owners in that period and thereby also decrease the regional imbalance in cars in that period. The fact that the incentive charge will also appear in the heavy-loading season should also stimulate the debtor roads themselves to purchase cars by presenting them with a choice of buying cars or using others' cars at times when the heavy traffic is moving and larger revenues are earned. By bunching the annual incentive return element into 6 months, the choice confronting the debtor roads is sharpened without increasing the annual incentive return earned by the creditor roads beyond the reasonable level indicated by the rate of return study.

Earmarking of funds.— A condition to the imposition of an incentive charge on boxcars which we tentatively propose is that the recipients of the incentive element set aside the net incentive balances into account 716, Capital and Other Reserve Funds, and account 797, Retained Income, Appropriated, as earmarked funds for the purchase, building or rebuilding of general service, unequipped boxcars. The purpose here is to preserve to the carriers maximum flexibility and discretion consistent with the tentative conclusion that the standard boxcar is in short supply and that the proposed increase in per diem charges pursuant to section 1(14)(a) is warranted to remedy that shortage.

We do not propose to prescribe the timing of additional boxcar purchases; we leave this to the carriers. Second, we do not propose to define the financial terms under which funds might be drawn down in any given year. A drawdown might be used to pay the full cost or a downpayment, or used to meet any prior commitment on any cars which were initially purchased in part by the use of earmarked funds. Third, we do not intend to affect the carriers' election to buy a particular subtype of general service, unequipped boxcars. Finally, no prior Commission approval would be needed for a drawdown that is otherwise consistent with this decision.

The earmarking requirement would apply only to the net credit balances resulting from the payment of the incentive charges. The unexpended funds remaining in the accounts of the carriers could be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter would become part of the fund.

The level of the proposed incentive charges, in our present judgment, would provide the carriers with an incentive to make regular and increasing commitments to the national boxcar fleet. We cannot, of course, be certain of this. Actual experience under the incentive charges may convince us in the future that earmarking should be modified or eliminated. We intend, by the earmarking requirement, to insure that the funds created by the incentive charge for the purpose of alleviating a national boxcar shortage are, in fact, eventually used for that purpose and no other.

Incentive per diem formula.—If the incentive per diem is to serve the alternative purpose of augmenting the freight car fleet, earmarked funds should not be used for the purpose of normal car replacement. The incentive charge was not adopted by Congress merely to maintain the *status quo* within the national car fleet.

The rule we here propose authorizes those railroads which will benefit from the net balances arising out of the incentive charge to expend those balances only for the costs of building or purchasing new general service, unequipped boxcars, or rebuilding older ones, beyond their normal annual outlays of funds for such purposes. We here seek at least to reduce the rate of decline in the national supply of general service, unequipped boxcars compared with levels that have pertained in recent years. In our judgment, the last 5 years of reported data (1964–1968) provide a fair gauge of the response of the railroad industry to the need for additional cars.

The table in appendix F sets forth a tabulation of the average number of new general service (equipped and unequipped) boxcars purchased or built in the period 1964–1968, as well as the average number of rebuilt boxcars, for the major per diem creditor railroads.[7] This table also shows in how many of the 5 years each road installed more or less than its 5-year average. The table suggests that the 5-year average substantially reflects current annual practice relating to installations of new cars. The data relating to rebuilt cars are quite sparse; and the average has generally been a low figure, often zero, for most roads.

Each railroad would be required under the proposed rule to average its number of new boxcars purchased or built and installed (general, unequipped) in the period 1964 through 1968, and separately the number of rebuilt and installed boxcars (general, unequipped) for the same period. It may thereafter use earmarked balances to purchase or build any number of general service, unequipped boxcars in a given year after it has purchased or built the 1964–1968 average number of such boxcars from other funds. Earmarked balances may be used to finance the whole or any part of cars purchased or built only after the average number have been purchased or built. Similarly, any carrier may rebuild older boxcars, in whole or in part, for general service from earmarked funds only after it has rebuilt its 1964–1968 average number of general service, unequipped boxcars.

For some railroads, such as the Burlington, it may be relatively easy to gear annual purchases to their 5-year average. For others, it may be necessary to defer annual purchases from the fund until the need arises for the purchase of cars in excess of the 5-year average. The carriers are given this election under the formula proposed.

It may be that railroads comprising one system would prefer to combine net debit or credit balances and compute a single average for the 1964–1968 period. If carriers make such election, they would be expected to apprise our Bureau of Accounts in writing prior thereto, setting forth the assents of all carriers participating in the election.

[7] The table reflects the data for railroads which in 1968 had per diem credit balances in excess of $1 million, except four smaller railroads which specialize in other types of cars, and one (Missouri-Illinois R.) where the data were incomplete.

GENERAL OBSERVATIONS

Although we cannot know whether incentive per diem will succeed, we do know that there are serious car supply problems, and that we possess the statutory authority to add an incentive element in an effort to solve them. We are issuing the present report in the belief that tentatively we now have sufficient data to reach a conscientious and informed judgment regarding the form and amount of an incentive charge that will continue to provide just and reasonable compensation, while both improving car utilization and increasing car supply. The solution proposed, we emphasize, is tentative only. The respondents and all other interested parties will be given the opportunity under the order issued concurrently with this report to set forth statements of position and in verified form any statements of fact they desire to add or to contest on this record. We earnestly hope for the cooperation and assistance of all concerned in this effort to resolve what is undoubtedly one of the most difficult and far-reaching problems today confronting the rail freight transportation industry.

An appropriate order will be entered.

VICE CHAIRMAN STAFFORD, concurring:

In my dissent in Ex Parte No. 252, I indicated that the evidence in support of an exact incentive per diem was slight but that the Commission should use every facility at its disposal to alleviate the shortage of rail cars in those areas plagued by yearly car shortages. I felt that the Commission was wasting valuable time in ignoring the mandate of Congress to insure the adequacy of the national railroad freight car supply by discontinuing that proceeding. Accordingly, I am concurring in the revised interim report in the hope that this proceeding may be concluded as expeditiously as possible.

COMMISSIONER MURPHY, concurring:

I agree with the majority that affirmative action to implement Public Law 89-430 without undue delay is essential. My position with respect to Public Law 89-430 was expressed in my dissenting opinion in *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967).

COMMISSIONER BUSH, concurring in part:

At least one objective of the interim report appears to be to implement the Congressional policy as declared in amended sec-

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tion 1(14)(a) in an expeditious manner. I do not believe, however, that we can legally establish incentive per diem charges until a hearing has been held as contemplated by the statute.

APPENDIX A

The railroad freight car study

Generally speaking, the only time there is a demand for freight equipment is when a car order is issued by a shipper to a railroad. Traditionally, a station receives the order for cars from a shipper with the specification of how many cars and what type are to be spotted on the shipper's siding, interchange track, or team track. If sufficient suitable cars to meet the shipper's demands on a particular day are on hand or received at the station during the same day, the car supply obviously is adequate. Therefore, information as to car demand and car supply at the station level is a logical starting point for determining the adequacy of car supply.

In the notice of proposed rulemaking entered in the proceeding on December 15, 1967, all common carriers by railroad subject to the act were required to participate in a study of car demand and supply conditions throughout the country. The study commenced January 29, 1968, was designed to develop car supply and performance information at the station level. Since class II line-haul railroads have few stations, information was reported for that class by railroad rather than by station. This was also the case with respect to the study of classes I and II switching and terminal companies and electric railways which was commenced July 15, 1968.

Selection of geographic zones.—The freight car study of the operations of all railroads proceeded on the basis of sampling the stations of 72 class I line-haul railroads and the total operations of 63 class II line-haul railroads.[1] The class I railroads completed a detailed data sheet for 2,641 sample stations. Each railroad reported data over an 11-month period extending from January 29, 1968, to December 31, 1968, plus a few days in January of 1969. The 135 railroads participating in the study filed a total of 32,420 reports during the course of the study year.

The class I railroad stations and the class II railroads were selected in each of six geographic areas or zones covering the continental United States. All data were then aggregated for each of the six zones. The six zones comprised the historical ratemaking territories with the following adjustments:

[1] The data for switching and terminal roads are omitted from the data in this report. The switching and terminal data indicate that the omission would not affect our conclusion. For example, in the last six periods of the study, the switching and terminal carriers received only 3 percent of all orders for boxcars in the study and had a comparable percent of the available cars on the study days.

Zone	Rate territory (as adjusted)
1	New England.
2	Official (including all of Illinois, Michigan, and Virginia).
3	Southern (excluding southern Virginia and eastern Louisiana).
4	Western trunkline (including Montana, Wyoming, western Colorado, southern Missouri; excluding the Upper Peninsula of Michigan).
5	Southwestern (including New Mexico, and all of Louisiana; excluding southern Missouri).
6	Mountain Pacific (excluding Montana, Wyoming, western Colorado, New Mexico).

The resulting zones included the following States:

Zone 1	Zone 2	Zone 3
New England	*Great Lakes and Mid-Atlantic*	*South*
Connecticut	Delaware	Alabama
Maine	District of Columbia	Florida
Massachusetts	Illinois	Georgia
New Hampshire	Indiana	Kentucky
Rhode Island	Maryland	Mississippi
Vermont	Michigan	North Carolina
	New Jersey	South Carolina
	New York	Tennessee
	Ohio	
	Pennsylvania	
	Virginia	
	West Virginia	

Zone 4	Zone 5	Zone 6
Midwest	*Southwest*	*Pacific*
Colorado	Arkansas	Arizona
Iowa	Louisiana	California
Kansas	New Mexico	Idaho
Minnesota	Oklahoma	Nevada
Missouri	Texas	Oregon
Montana		Utah
Nebraska		Washington
North Dakota		
South Dakota		
Wisconsin		
Wyoming		

Sampling of stations.—Probability sampling techniques were used to select the stations to be studied. Study stations were chosen on the basis of volume of traffic, and only the larger class II roads were selected. A list of stations was prepared from the list of freight stations having employees, which was submitted to the Commission by the railroads in 1965 for use in the station study. This list was then checked against the freight station Accounting Code

Directory which is published by the Association of American Railroads (AAR). The accounting numbers on the railroads list were checked against the station numbers as shown in the directory. Those numbers in the directory, which were not on the railroads list, were then compared with Leland's Open and Pre-pay Station List, I.C.C. No. A-47, to determine whether the station was an open station or a prepay station. Any stations appearing in Leland's, which were not on the railroad list, were added to the railroad list.

The list of agency stations was then checked against the 1-percent waybill records to determine the volume of originations at each station for the year 1964. Stations which the waybill sample showed to have originated 60 or more carloads were all chosen as study stations. The balance of the stations were sampled at the following rate:

Zone 1	New England	1/1
Zone 2	Great Lakes-Mid-Atlantic	1/10
Zone 3	South	1/4
Zone 4	Midwest	1/10
Zone 5	Southwest	1/3
Zone 6	Pacific	1/3

The frame from which class II railroads were chosen, based on volume of traffic, was sampled at the rate of 1/4 in all 6 zones.

Many prepay stations in the United States originate traffic. These stations come under the jurisdiction of an agent who handles car orders and supplies cars to shippers that use these stations. Therefore, each study station was also required to report the business of the prepay stations coming under its jurisdiction.

Sampling of study days.—The time universe for the study was 12 four-week periods, or 288 days, commencing January 29, 1968. The time universe comprised a working day frame of 48 days for each day of the week, Monday through Saturday, giving a total of 48 times 6 or 288 days. Sundays and holidays were excluded because normally no car orders are received on those days. From the balance of the days in the study period, 12 days were selected for each railroad so that each Monday through Saturday, inclusive, was represented twice. Thus, each station would report for two Mondays, two Tuesdays, et cetera, throughout the 288-day period. In this way the demand and supply characteristics were sampled by days of the week.

A different set of random days was selected for each railroad. Although this method resulted in a variety of study days for stations encompassed in a region, it was done to discover the effect of any distinct operating practices of individual railroads on supply and demand.

Cars in restricted service.—Shipper-owned or shipper-leased cars were excluded from the study except when such cars were made available for general use. Government-owned cars and cars of Canadian or Mexican ownership were also excluded from the study unless, in the case of Government-owned cars, they were released for general service. In the case of Canadian and Mexican cars, if they could be legally loaded and moved, only then were they considered part of the fleet to satisfy shipper demands. The study primarily encompassed only the demand and supply for cars of which the railroads had control.

Railroad cars owned or leased by a carrier, which are assigned to particular shippers, and cars subject to special disposition orders were excluded from the study. For example, if an assigned car were located at a termination point and this point were a study point, the car was not considered a part of the available supply at that point, because the car was under specific orders to be returned to the shipper empty; however, if that car were located at the origination point, it was counted.

Design of sample.—To obtain car supply data (*i.e.*, the cars physically on hand at the study stations on the study day), the reporting railroads were required to record the number of cars on hand, by type of car, at the beginning of a study day and those received during the day. By removing the unserviceable and unsuitable cars from the cars on hand and received, the number of "available cars" was determined, representing serviceable cars which the railroads had on hand to meet shipper orders. The railroads reported car orders on two basis, those outstanding for placement on the study day (whether ordered on or prior to the study day), and those received on the study day irrespective of the day on which the shipper desired placement.

Due to the holidays, there was an uneven number of reporting days in some of the 4-week time periods. The sample was designed to compensate for these holidays by the substitution of comparable days, *e.g.*, a Monday for a Monday, a Tuesday for a Tuesday. In addition, comparable substitutions of days were made to avoid having any one carrier report on consecutive days less than 2 weeks apart. As a result of these substitutions, the time periods diverged somewhat from the calendar months. Accordingly, we have compared selective data with and without the substitutions of days. Since the differences between the two sets of data are not important, our analysis will be based upon the periods approximating calendar months.

The primary objectives of the study were to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand. Voluminous data were thus compiled by the railroads under continual audit and guidance by our staff in a manageable and useful form, and in accordance with sound statistical practice.

The orders received from shippers, which are reflected in the study, appear to be bona fide, and untainted by any material amount of overordering. In this connection, our service agents audited 73.6 percent of the class I stations in the study.[2] Each service agent performing an audit completed a detailed questionnaire which included the question, "Is there any duplication or inflation in the car orders reported in line No. 1?", and a like question regarding the orders in line No. 5 of the data sheet. The service agents responded:

	Line No. 1 orders			Line No. 5 orders		
	Responding "No"	Responding "Yes"	Not responding	Responding "No"	Responding "Yes"	Not responding
Number-----	1,752	70	91	1,781	52	110
Percent of total-----	91.7	3.5	4.7	91.7	2.7	5.7

[2]There were 1,943 audits performed at the study stations of the class I railroads. A total of 2,641 stations participated in the study.

Our service agents found no evidence of overordering in 91.7 percent of the audits, and affirmative evidence of overordering in only 3.5 percent or less of the audits.

During the study year, moreover, the carriers reported an estimated total of 23,403,430 orders for the placement of cars on the day ordered or on a subsequent thereto and in fact placed 23,198,136 cars (or 99.1 percent) against those orders. For plain boxcars, the comparable percentage is 98.7 percent.[3] This indicates, in our present opinion, that the data are substantially free of any overstatement of demand.

RESULTS OF THE FREIGHT CAR STUDY

On May 13, 1969, this Commission transmitted to Congress certain data from the 1968 freight car study grouped into two time periods each containing 6 study periods. In the answers to questions from Senator Hartke, this Commission advised the Congress that the study was being further refined and evaluated.[4] The present report is based on that further evaluation of the freight car study.

We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national boxcar fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues.

Definitions.—For convenience of discussion in this portion of the report, we use the word "shortages" to represent the difference between the shippers' orders for cars and the carriers' physical supply of cars, where the supply is insufficient to meet the orders at the point where the cars are to be used. A "shortage" for a particular station technically and precisely in the study is:

(a) outstanding or unfilled orders for the placement of cars on or before the study day as of the start of such day;
+ (b) orders filed during the study day for placement of cars on that day, including cars appropriated by shippers;
- (c) cancellations received during the study day of orders set forth in (a) and (b) above;
- (d) cars available at the station in question.

"Cars available" consists of serviceable and suitable empty cars on hand at the start of the study day plus serviceable and suitable empty cars received during the study day. A "surplus" would exist at a particular station if the cars available were more than sufficient to meet the orders at that station.

The shortage and surplus statistics for each station were then collected for all sample stations within each zone for each of the 12 periods. Thus, if only three stations reported a shortage for a period—for example, one reported a shortage of 75 cars; another, of 50 cars; and the third, of 25 cars—the reported shortage for these stations would be 150 cars. Other stations might at the

[3] There were 5,545,056 orders and 5,474,328 placements of plain boxcars in the study year.

[4] See "Review of I.C.C. Policies and Practices," Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess., Serial No. 91-16, pages 105, 107, 228 (1969).

same time experience a surplus of available cars. To obtain separate estimates of shortages and surpluses for the region, an expansion factor, as determined by the sampling ratios, was applied to individual station data.

A third statistic, a "deficiency" in filling orders, represents the difference between shipper orders for placement of cars on the study day and the actual placements in fulfillment of such orders for a particular day. In terms of the above definition of shortage, a deficiency is defined as (a) + (b) - (c) minus placements (not in excess of orders)[5] of cars during the study day. This particular statistic represents the failures of performance in meeting shipper demand for cars. It relies on back orders and on orders calling for delivery of cars on the study day; the placements are the cars that were placed on the study day less advance placements in anticipation of orders or in excess of shippers' indicated needs.[6] The deficiency figure for a period is based on the total of all such deficiencies reported by sample stations within a zone expanded at the sampling rates.

Role of improved utilization.—In the analysis and study of the 1968 data, initial consideration was accorded the possibility of greater utilization of the existing car fleet. A brief description of the progress achieved in this area in the 1960's was set forth in our prior report (332 I.C.C. at 16). The 1968 study data place in better perspective the role of improved utilization of cars to meet deficiencies in the fulfillment of shippers' orders.

In 1968, there was considerable fluctuation in the deficiencies in filling current orders for boxcars. In zone 2, the Great Lakes-Mid-Atlantic zone, deficiencies in filling current orders for plain boxcars in any 4-week period of 1968 ranged from an average daily low of 924 to a high of 4,222 cars, and in zone 4 (the Midwest), from 898 to 6,265 cars. Deficiencies in filling orders of shippers in these two zones for plain boxcars in each of the 4-week periods were as follows:

Line No.	Time periods—1968[7]	Zone 2 Great Lakes-Mid-Atlantic	Zone 4 Midwest
1	January 29 to February 24	2,972	3,393
2	February 26 to March 23	1,783	1,892
3	March 25 to April 20	1,884	1,287
4	April 22 to May 18	1,574	1,012
5	May 20 to June 15	924	1,317
6	June 17 to July 13	1,829	1,847
7	July 15 to August 10	1,563	1,070
8	August 12 to September 7	1,507	898
9	September 9 to October 5	2,322	2,878
10	October 7 to November 2	4,222	3,606
11	November 4 to 30	3,114	6,265
12	December 2 to 30, and January 2, 6, 9, 16, and 23, 1969	1,020	2,989

[5]The orders relied on were for placement on or before the study day. Placements in excess of reported orders were eliminated, since they were made for placement of orders subsequent to the study day.

[6]Deficiencies and "total placements" are shown in appendix C. The total placement figures shown in appendix C are prior to the deduction of early placements.

[7]The last time period was adjusted in the compilation of the data to make up for the exclusion of the six holidays in the other time periods.

A similar pattern existed throughout the year in the two zones: high deficiencies in the first two or three periods, much smaller deficiencies in the spring and summer months, and again high deficiencies in the fall and early winter (the last four periods).[8]

Appendix C sets forth the study data relating to deficiencies and to total placements. In many months during the fall and winter, the placements were at such a sufficiently high level that, if they had been sustained throughout the year, they would have entirely eliminated the smaller deficiencies of certain other months. For example, the carriers in zone 4 placed 112,632 cars in the ninth period; if they had placed 112,000 cars in each of the study periods, they would have removed all their deficiencies in placements in the third period and nearly all in two other periods (Nos. 4 and 5).

According to appendix C, in the Great Lakes-Mid-Atlantic zone during the second 4-week period of the study (February 26 to March 23), the total placements were 163,608 plain boxcars. In the fourth period, April 22 to May 18, only 125,568 cars were placed in that zone, while there were 37,776 deficiencies in filling orders. If the railroads in that zone had placed 163,608 plain boxcars in the latter period, as they in fact did in the former period, it seems reasonable to conclude that they would have entirely eliminated the 37,776 deficiencies in the latter period. The fewer placements between April 22 and May 18 seem not to have been affected by a lack of plain boxcars, because in that period they had a surplus of more than 14,000 cars greater than the surplus in the earlier period.[9]

The carriers in the Midwest placed their maximum number of cars in September and the carriers in the Great Lakes-Mid-Atlantic zone, in March. Although placements at the maximum monthly rate would have eliminated most deficiencies in the spring and summer, such performance in the fall and winter months would still have left deficiencies ranging from 40,320 to 67,704 cars, excepting the 12th time period, in the Great Lakes-Mid-Atlantic zone and from 32,376 to the enormous deficiency of 135,480 cars in the Midwest.

The data suggest that the maintenance of even the maximum level of performance in placing the existing fleet of cars throughout the year would eliminate certain lesser deficiencies in certain periods, but would not entirely eliminate all deficiencies. Even as a goal for which the carriers might strive, the maximum level of annual performance does not fully meet shipper requirements. A high level of deficiencies would even then continue to exist for at least half the year. Other data even more strongly suggest the limitations that exist on the attainment of large improvements in car utilization to meet the high levels of deficiencies in the fall and winter months.

Effect of inadequate car supply.—Like the data set forth in the CS-44 reports of the railroads to AAR, the 1968 study data revealed both a failure of the carriers at many study stations to fill the shipper demand for plain boxcars, and yet, at the same time, large surpluses of boxcars. As a consequence, the data have been analyzed to determine whether the surpluses could have been used to meet the unfilled orders.

In appendix D, page 3, the shortages of available cars and the deficiencies in placements are shown for each zone for each of the 12 four-week periods in 1968. Immediately thereafter, on the same page, the ratios of shortages

[8]Only limited data were available for the month of January in the study.

[9]The surplus in zone 3 from April 22 to May 18 was 589,824 cars; the surplus from February 26 to March 23 was only 575,352 cars.

o deficiencies are shown. The chart se
graph of these ratios. The ratios provide indi
as a factor in the failure to fill orders, and
o place cars was likely due to the failure
here they were needed.

It is axiomatic that a carrier can only mak
Even when cars are available, however, def
available at deficiency stations have been
deficiencies, as those terms are here defin
ratio is less than 100 percent, the deficie
surplus. A 100-percent ratio, then, indicat
of maximum use of cars available at these
distribution of cars from surplus stations or
deficiencies. Generally, the ratios of short
in the periods of peak demand on the ca
unfilled. This is demonstrated in appendix D

In the last four time periods, the rati
placements in the Midwest were 74 perce
percent, respectively, and in the Great Lak
69 percent, 80 percent, and 62 percent. D
and the Great Lakes-Mid-Atlantic zones
difficulties in meeting orders, they were al
ten with shortages of available cars at stati
the same carriers experienced large surpl
prior report. The next step in the analys
what extent the carriers could be expected
pluses.

The table and chart in appendix D, pages
placements to the surpluses for each period
onstrate the control over surpluses that wo
week period to have filled all orders on a
in appendix D, pages 2 and 3, means that the
a ratio existed could have met all orders o
the placements as reported, they had also
surplus of available cars where they were n

According to the statistics of appendix D,
available was large enough in the Midwest in
elimination of most deficiencies by utilizatio
in that region. However, by the 11th time
zone were called upon by their shippers to
of the regional surplus where it was needed
above the cars actually placed.

In the 11th period, the deficiencies in fil
their peak for the year of 150,360 cars. Th
throughout the Midwest at the time fell to
midwestern carriers could have kept up wit
only through maintaining control and routi
scattered throughout the Midwest. At the sa
Atlantic zone the deficiencies in filling ord
within the region. Furthermore, in October

forth in appendix D, page 1, is a
s of the importance of shortages
dicate to what extent the failure
have a sufficient supply of cars

placements from cars available.
iencies may persist. If all cars
placed, the ratio of shortages to
l, will be 100 percent. When the
y station may or may not have a
that deficiencies occur in spite
ations, and only improvement in
augmented car fleet can reduce
es to deficiencies are quite high
fleet—when most orders are left
ereto.
of shortages to deficiencies in
, 84 percent, 84 percent, and 68
-Mid-Atlantic zone, 63 percent,
ing the period when the Midwest
re experiencing their greatest
experiencing the greatest prob-
s. To be sure, at other stations
es, a fact we also noted in our
, therefore, was to determine to
o better utilize these large sur-

and 3, relate the deficiencies in
n each zone. These ratios dem-
d have been necessary in any 4-
rrent daily basis. A ratio of 10
rriers in the region where such
a current basis if, in addition to
placed 10 percent of the regional
ied in the region.
ges 2 and 3, the surplus of cars
he spring and summer to permit
of 5 to 10 percent of the surplus
eriod, carriers operating in that
lace the equivalent of 40 percent
throughout the Midwest over and

g orders in the Midwest rose to
surplus of cars at other stations
e yearly low 305,016. Thus, the
the flow of loading requirements
40 percent of the surplus cars
e time, in the Great Lakes-Mid-
s were 21 percent of the surplus
when the latter zone experienced

its greatest deficiencies (101,328 cars), the deficiencies were 28 percent of the surplus. In both the foregoing zones the ratio of deficiencies to surplus cars ranged between only 5 and 10 percent in the spring and summer months.

Even if it is assumed that all surplus in zone 4 belongs to one carrier, it would be difficult enough for that carrier to control and route 40 percent of all the surplus cars scattered over the entire Midwest region; the problem is further complicated by the fact that the scattered surplus is on line of numerous competing railroads. For example, in appendix E we have set forth for three competing railroads[10] the amounts of their individual surpluses on line in the Midwest during the study year, and the percent of their individual Midwest surpluses to the total Midwest regional surplus in each of the 13 periods. In heavy-loading periods, these railroads had only a small fraction of the Midwest surplus cars on their individual lines.

It seems apparent from the foregoing ratios and charts that the shift of a substantial portion of the car supply in those periods from other zones to the Midwest would have reduced the already diminished supply of cars available for relieving deficiencies in placements in other zones. It is true that the utilization of less than 10 percent of the surplus in the spring and summer would eliminate most deficiencies. But in the fall and winter months, even if the use of surpluses were redoubled in an effort to meet the demand, such utilization would not be sufficient to fill all orders. For example, in the Great Lakes-Mid-Atlantic zone, in the spring and summer of 1968, deficiencies ranged from 5 percent to 9 percent of surpluses, while in October and November they rose to 28 percent and 21 percent, respectively. In the Pacific zone, the spring and summer ratios were between 4 percent and 8 percent, and in November and December, deficiencies were 18 percent of surpluses. In the South the ratio rose to a peak of 22 percent in October and in the Southwest to a peak of 15 percent in February. In view of the concurrence of shortages of cars throughout most zones of the country, it appears that the return of cars to owning lines in such periods, although probably effective in some areas, would not provide a complete solution for the fall and winter deficiencies. Even if the regional imbalance were eliminated, there would still be substantial shortages which probably can only be relieved by an increase in the national fleet to meet demands of shippers who in 1968 ordered plain boxcars. The statistics show that the performance in filling orders in all zones in the fall and winter months was affected by a shortage of boxcars.

[10] Where the railroad was located in more than one zone, we have counted only the surplus cars located on portions of the line within the Midwest zone.

APPENDIX B

Comparison of per diem charges—basic (time charges) and incentive

Line No.	Cost bracket	Group A—0-5 years		Group B—6-10 years		Group C—11-15 years		Group D—16-20 years		Group E—21-25 years		Group F—26-30 years		Group G—over 30 years	
		Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]	Basic per diem (time charges)[1]	Incentive[2]
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
1	$ 0-1,000	$0.85	$0.32	$0.82	$0.27	$0.79	$0.22	$0.75	$0.17	$0.72	$0.11	$0.69	$0.06	$0.63	$0.04
2	1-3,000	1.09	0.83	1.03	0.54	0.98	0.44	0.90	0.33	0.89	0.23	0.78	0.12	0.65	0.07
3	3-5,000	1.57	1.30	1.45	1.09	1.32	0.88	1.20	0.67	1.08	0.46	0.96	0.25	0.69	0.14
4	5-7,000	2.05	1.95	1.86	1.63	1.68	1.32	1.50	1.00	1.32	0.68	1.13	0.37	0.73	0.21
5	7-9,000	2.53	2.60	2.28	2.18	2.04	1.75	1.80	1.33	1.55	0.91	1.31	0.49	0.77	0.28
6	9-11,000	3.01	3.25	2.70	2.72	2.40	2.19	2.09	1.67	1.79	1.14	1.48	0.61	0.81	0.35
7	11-13,000	3.49	3.90	3.12	3.26	2.76	2.63	2.39	2.00	2.03	1.37	1.66	0.74	0.85	0.42
8	13-15,000	3.97	4.55	3.54	3.81	3.12	3.07	2.68	2.33	2.26	1.60	1.83	0.86	0.89	0.49
9	15-17,000	4.45	5.19	3.96	4.35	3.47	3.51	2.98	2.67	2.50	1.82	2.01	0.98	0.93	0.56
10	17-19,000	4.93	5.84	4.38	4.89	3.83	3.95	3.28	3.00	2.74	2.05	2.19	1.11	0.97	0.63
11	19-21,000	5.41	6.49	4.80	5.44	4.19	4.39	3.58	3.33	2.97	2.28	2.36	1.23	1.01	0.70
12	21-23,000	5.89	7.14	5.22	5.98	4.55	4.82	3.88	3.67	3.21	2.51	2.54	1.35	1.05	0.77
13	23-25,000	6.37	7.79	5.64	6.53	4.91	5.26	4.18	4.00	3.44	2.74	2.71	1.47	1.09	0.84
14	25-27,000	6.85	8.44	6.06	7.07	5.27	5.70	4.47	4.33	3.68	2.96	2.89	1.60	1.13	0.91
15	27-29,000	7.34	9.09	6.48	7.61	5.63	6.14	4.77	4.67	3.92	3.19	3.06	1.72	1.18	0.98
16	29-31,000	7.82	9.74	6.90	8.16	5.98	6.58	5.07	5.00	4.15	3.42	3.24	1.84	1.22	1.05
17	31-33,000	8.30	10.39	7.32	8.70	6.34	7.02	5.37	5.33	4.39	3.65	3.41	1.96	1.26	1.12
18	33-35,000	8.78	11.04	7.74	9.25	6.70	7.46	5.67	5.67	4.63	3.88	3.59	2.08	1.30	1.19
19	35-37,000	9.26	11.69	8.16	9.79	7.06	7.89	5.98	6.00	4.86	4.10	3.77	2.21	1.34	1.26
20	37-39,000	9.74	12.33	8.58	10.33	7.42	8.33	6.26	6.33	5.10	4.33	3.94	2.33	1.38	1.33
21	39-41,000	10.22	12.98	9.00	10.88	7.78	8.77	6.56	6.67	5.34	4.56	4.12	2.46	1.42	1.40

[1]The amounts in columns (2), (4), (6), et cetera, are the total per diem charges prescribed by the Commission in its decision, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, with minor revisions subsequent thereto. The amounts correspond to those in columns (7), (9), (11), et cetera, of Rate Table C, at pages 242 and 243 of the decision. Basic mileage charges are additional and are not included in these columns. Both the basic time and mileage charges are collectible throughout the year.

[2]The incentive is computed by applying to the net investment a rate of 6 percent representing the difference between a current market rate of return of 12 percent and the rate of 6 percent used in computing the basic per diem charges prescribed by the Commission in its decision of January 17, 1968. The incentive is collectible over a period of 6 months in each year.

APPENDIX B—Continued

Computation of the incentive charge per $1,000 of net investment at 6 percent per annum of net investment

Line No.	Year of life (1)	Net investment per $1,000[1] (2)	Incentive (col. 2x6 percent) (3)	Group A 0-5 years (4)	Group B 6-10 years (5)	Group C 11-15 years (6)	Group D 16-20 years (7)	Group E 21-25 years (8)	Group F 26-30 years (9)	Group G over 30 years (10)
1---	1st	$985.00	$59.10	$59.10	----------	----------	----------	----------	----------	----------
2---	2d	955.00	57.30	57.30	----------	----------	----------	----------	----------	----------
3---	3d	925.00	55.50	55.50	----------	----------	----------	----------	----------	----------
4---	4th	895.00	53.70	53.70	----------	----------	----------	----------	----------	----------
5---	5th	865.00	51.90	51.90	----------	----------	----------	----------	----------	----------
6---	6th	835.00	50.10	---------	$50.10	----------	----------	----------	----------	----------
7---	7th	805.00	48.30	---------	48.30	----------	----------	----------	----------	----------
8---	8th	775.00	46.50	---------	46.50	----------	----------	----------	----------	----------
9---	9th	745.00	44.70	---------	44.70	----------	----------	----------	----------	----------
10---	10th	715.00	42.90	---------	42.90	----------	----------	----------	----------	----------
11---	11th	685.00	41.10	---------	----------	$41.10	----------	----------	----------	----------
12---	12th	655.00	39.30	---------	----------	39.30	----------	----------	----------	----------
13---	13th	625.00	37.50	---------	----------	37.50	----------	----------	----------	----------
14---	14th	595.00	35.70	---------	----------	35.70	----------	----------	----------	----------
15---	15th	565.00	33.90	---------	----------	33.90	----------	----------	----------	----------
16---	16th	535.00	32.10	---------	----------	----------	$ 32.10	----------	----------	----------
17---	17th	505.00	30.30	---------	----------	----------	30.30	----------	----------	----------
18---	18th	475.00	28.50	---------	----------	----------	28.50	----------	----------	----------
19---	19th	445.00	26.70	---------	----------	----------	26.70	----------	----------	----------
20---	20th	415.00	24.90	---------	----------	----------	24.90	----------	----------	----------
21---	21st	385.00	23.10	---------	----------	----------	----------	$23.10	----------	----------
22---	22d	355.00	21.30	---------	----------	----------	----------	21.30	----------	----------
23---	23d	325.00	19.50	---------	----------	----------	----------	19.50	----------	----------
24---	24th	295.00	17.70	---------	----------	----------	----------	17.70	----------	----------
25---	25th	265.00	15.90	---------	----------	----------	----------	15.90	----------	----------
26---	26th	235.00	14.10	---------	----------	----------	----------	----------	$14.10	----------
27---	27th	205.00	12.30	---------	----------	----------	----------	----------	12.30	----------
28---	28th	175.00	10.50	---------	----------	----------	----------	----------	10.50	----------
29---	29th	145.00	8.70	---------	----------	----------	----------	----------	8.70	----------
30---	30th	115.00	6.90	---------	----------	----------	----------	----------	6.90	----------
31---	31st	100.00	6.00	---------	----------	----------	----------	----------	----------	$6.00
32---	Total	16,600.00	996.00	277.50	232.50	187.50	142.50	97.50	52.50	----------
33---	Per year	----------	------	55.50	46.50	37.50	28.50	19.50	10.50	----------
34---	Per day, collectible in 6 months (Line 33 divided by 171 days)			32.460	27.190	21.930	16.670	11.400	6.140	2.810

[1]The table assumes a car life of 30 years and an annual depreciation rate of 6 percent with 10 percent salvage value. Net investment is shown at midyear.

APPENDIX C

Ex Parte No. 258 (Sub-No. 1) Incentive Per Diem Charges—1968, deficiencies in placements and total placements, boxcars—general service (unequipped), for 13 four-week periods—January 29, 1968, to January 25, 1969, inclusive

Line No.	Item (1)	Time period No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 12 (13)
	United States total												
1	Deficiencies in placements-	251,592	156,432	144,504	121,128	115,032	135,240	112,008	107,928	172,296	260,544	306,840	170,304
2	Total placements----------	499,728	498,192	428,016	426,600	428,448	436,512	405,840	428,208	471,360	448,008	485,744	428,064
	Zone 1—New England												
3	Deficiencies in placements-	*	*	*	*	*	*	*	*	*	*	*	*
4	Total placements----------	*	*	*	*	*	*	*	*	*	*	*	*
	Zone 2—Great Lakes-Mid-Atlantic												
5	Deficiencies in placements-	71,328	42,792	45,216	37,776	22,176	43,896	37,512	36,168	55,728	101,328	79,736	24,480**
6	Total placements----------	136,320	163,608	125,568	125,568	149,136	155,712	134,216	132,504	148,200	129,984	138,648	126,816
	Zone 3—South												
7	Deficiencies in placements-	36,912	37,056	31,344	25,800	35,088	20,664	24,816	29,040	25,512	38,256	34,224	24,120
8	Total placements----------	112,248	113,520	92,088	87,264	78,048	73,200	73,464	87,696	87,384	91,992	108,144	84,888
	Zone 4—Midwest												
9	Deficiencies in placements-	81,432	45,408	30,888	24,288	31,608	44,328	25,680	21,552	69,072	86,544	150,360	71,736
10	Total placements----------	111,696	99,600	77,568	92,856	86,736	104,112	99,816	81,024	112,632	107,904	97,752	86,448
	Zone 5—Southwest												
11	Deficiencies in placements-	27,024	7,272	13,008	8,160	7,128	8,376	10,656	10,560	*	10,584	12,960	12,600
12	Total placements----------	60,888	55,416	53,808	44,280	42,504	41,184	36,024	45,288	48,568	46,176	48,440	46,464
	Zone 6—Pacific												
13	Deficiencies in placements-	32,400	20,256	23,328	22,800	18,312	17,280	11,952	14,784	16,728	23,784	34,368	35,472
14	Total placements----------	64,176	52,560	67,848	63,360	60,240	53,112	47,232	62,088	62,352	56,232	61,104	57,672

1. Deficiencies in placements—total orders, line 1 minus line 6 of the data sheet minus placements, line 4 of the data sheet minus early placements as reported in part II of the data sheet.

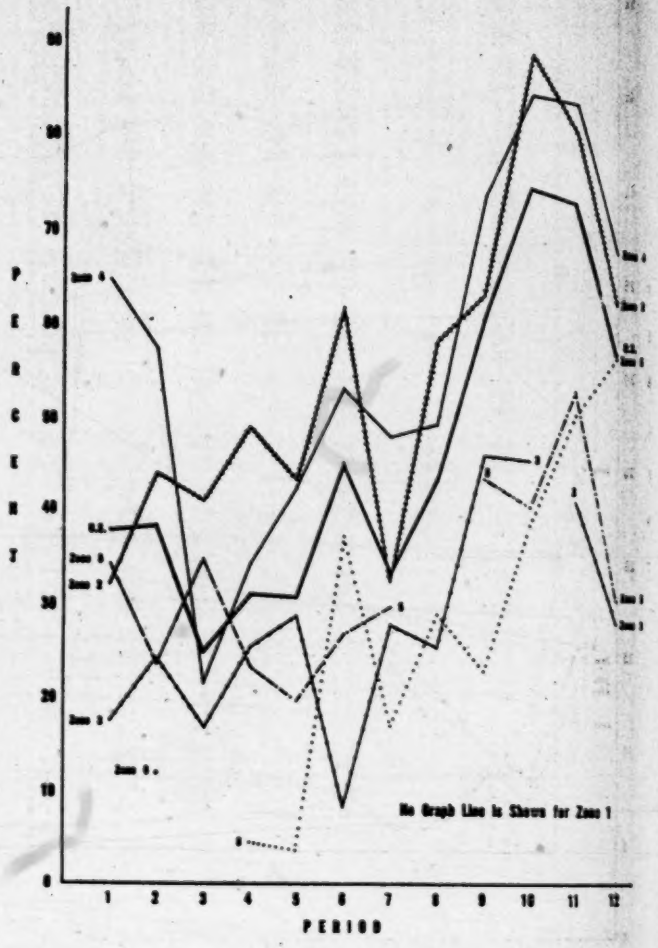
2. Total placements—line 4 of the data sheet.

*Withheld due to high variability in the estimate using the data with substitutions of days.

**Although not suppressed, the estimate based on data with substitutions of days indicates high variability.

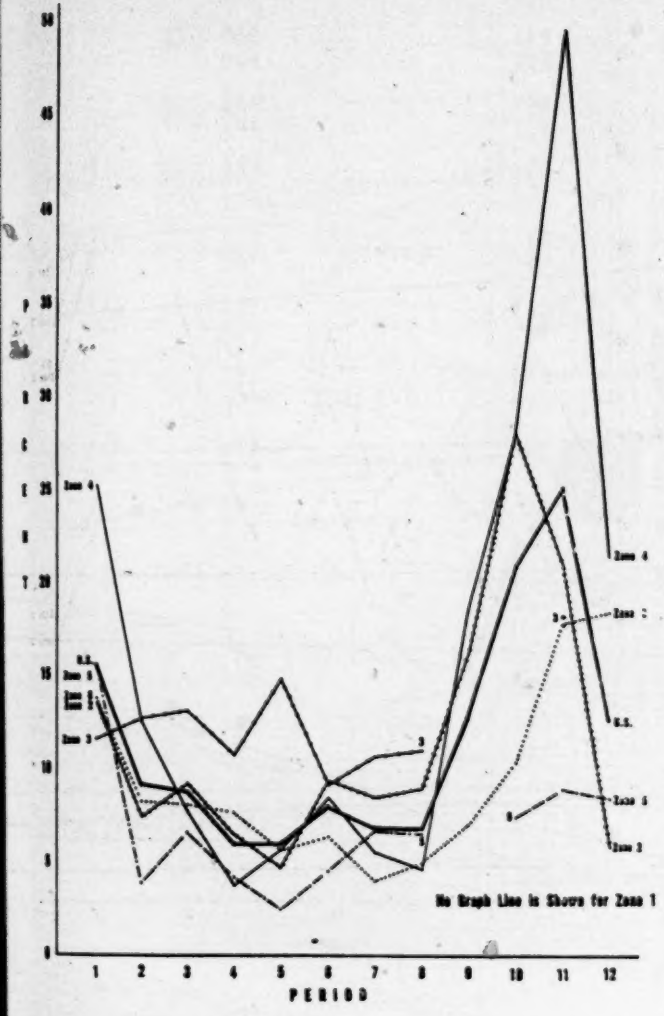
APPENDIX D

Percent of car shortages to deficiencies in placements boxcar—general service (unequipped) 12 four-week periods, January 29, 1968 to January 25, 1969, inclusive



APPENDIX D—Continued

Percent of deficiencies in placements to surpluses boxcar—general service (unequipped) 12 four-week periods, January 29, 1968 to January 25, 1969, inclusive



APPENDIX D—Continued

Ex Parte No. 258 (Sub-No. 1) Incentive Per Diem Charges—1968, shortages and surpluses related to deficiencies in placements, boxcar—general service (unequipped), for the 13 four-week periods January 28, 1968, to January 25, 1969, inclusive

Line No.	Item (1)	Time period No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 12 (13)
	United States total												
1	Shortages	95,208	59,808	36,024	37,512	35,280	60,912	37,248	46,728	104,280	193,992	223,944	97,128
2	Deficiencies in placements	251,592	156,432	144,504	121,128	115,032	135,240	112,008	107,928	172,296	280,544	306,840	170,304
3	Surpluses	1,628,424	1,712,160	1,661,184	2,022,480	1,922,016	1,717,656	1,649,304	1,582,104	1,341,480	1,251,912	1,227,072	1,351,368
4	Percent shortages to deficiencies	37.8	38.2	24.9	31.0	30.7	45.0	33.3	43.3	60.5	74.5	73.0	57.0
5	Percent deficiencies to surpluses	15.5	9.1	8.7	6.0	6.0	7.9	6.8	6.8	12.8	20.8	25.0	12.6
	Zone 1—New England												
6	Shortages	*	*	*	*	*	*	*	*	*	*	*	*
7	Deficiencies in placements	*	*	*	*	*	*	*	*	*	*	*	*
8	Surpluses	*	*	*	*	*	*	*	*	*	*	*	*
9	Percent shortages to deficiencies	*	*	*	*	*	*	*	*	*	*	*	*
10	Percent deficiencies to surpluses	*	*	*	*	*	*	*	*	*	*	*	*
	Zone 2—Great Lakes-Mid-Atlantic												
11	Shortages	22,824	18,768	18,456	18,456	9,576	27,072	12,120	21,024	35,088	89,784	60,120	15,240
12	Deficiencies in placements	71,328	42,792	45,216	37,776	22,176	43,896	37,512	36,168	55,728	101,328	74,736	24,480
13	Surpluses	534,120	575,352	493,056	589,824	474,480	473,760	447,024	408,104	348,600	361,416	359,304	419,880
14	Percent shortages to deficiencies	32.0	43.9	40.8	48.9	43.2	61.7	32.3	58.1	63.0	88.6	80.4	62.3
15	Percent deficiencies to surpluses	13.4	7.4	9.2	6.4	4.7	9.3	8.4	8.9	16.1	28.0	20.8	5.8
	Zone 3—South												
16	Shortages	8,432	8,928	5,208	6,504	10,032	1,704	6,864	6,072	*	*	14,016	8,784
17	Deficiencies in placements	36,912	37,056	31,344	25,800	35,088	20,664	24,816	24,048	25,512	38,256	34,224	24,120
18	Surpluses	320,304	294,048	241,056	240,984	238,368	226,704	234,720	220,848	180,944	176,136	180,712	216,528
19	Percent shortages to deficiencies	17.4	24.1	16.6	25.2	28.6	8.2	27.7	25.3	45.9	45.4	41.0	36.0
20	Percent deficiencies to surpluses	11.5	12.6	13.0	10.7	14.7	9.1	10.6	10.9	*	*	19.0	*

See notes at end of table.

Ex Parte No. 288 (Sub-No. 1) Incentive Per Diem Charges—1968, shortages and surpluses related to deficiencies in placements, boxcar—general service (unequipped), for the 13 four-week periods January 29, 1968, to January 25, 1969, inclusive—Continued

Line No.	Item (1)	Time period No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 12 (13)
	Zone 4—Midwest												
21	Shortages	52,656	25,968	6,624	8,280	13,416**	23,472	12,288	10,608	50,856	73,056	125,592	48,624
22	Deficiencies in placements	81,432	45,408	30,888	24,288	31,608	44,328	25,680	21,552	69,072	86,544	150,360	71,736
23	Surpluses	324,288	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
24	Percent shortages to deficiencies	64.7	57.2	21.4	34.1	42.4	53.0	47.9	49.2	73.6	84.4	83.5	67.8
25	Percent deficiencies to surpluses	25.1	12.4	7.7	3.7	5.6	8.4	5.5	4.6	18.5	27.9	49.3	21.3
	Zone 5—Southwest												
26	Shortages	9,216	1,704	4,512	1,896	1,392	2,232	3,168	*	*	4,272	6,840	4,848
27	Deficiencies in placements	27,024	7,272	13,008	8,160	7,128	8,376	10,656	10,560	*	10,584	12,960	12,600
28	Surpluses	175,728	193,608	196,680	198,672	282,576	186,672	159,816	161,880	158,472	142,968	145,800	149,496
29	Percent shortages to deficiencies	34.1	23.4	34.7	23.2	19.5	26.6	29.7	*	43.4	40.4	52.8	38.5
30	Percent deficiencies to surpluses	15.4	3.8	6.6	4.1	2.5	4.5	6.7	6.5	*	7.4	8.9	8.4
	Zone 6—Pacific												
31	Shortages	*	2,376	*	960	648	6,432	2,016	4,272	3,792	9,168	17,304	20,040
32	Deficiencies in placements	32,400	20,256	23,328	22,800	18,312	17,280	11,952	14,784	16,728	23,784	34,368	35,472
33	Surpluses	236,448	247,368	292,848	300,552	325,056	275,136	304,344	301,608	239,784	230,112	194,304	194,232
34	Percent shortages to deficiencies	*	11.7	*	4.2	3.5	37.2	16.9	28.9	22.7	38.5	50.3	56.5
35	Percent deficiencies to surpluses	13.7	8.2	8.0	7.6	5.6	6.3	3.9	4.9	7.0	10.3	17.7	18.3

1. Shortages and/or surpluses—line 1 minus line 6 of the data sheet, minus the sum of line 2 minus line 7 and line 3 minus line 8 of the data sheet.
Shortages—orders exceed supply as determined by above formula.
Surpluses—supply exceeds orders as determined by above formula.

2. Deficiencies in placements—line 1 minus line 6 of the data sheet minus line 4 of the data sheet.

3. Percentage of shortages to deficiencies in placements—shortages divided by deficiencies in placements.

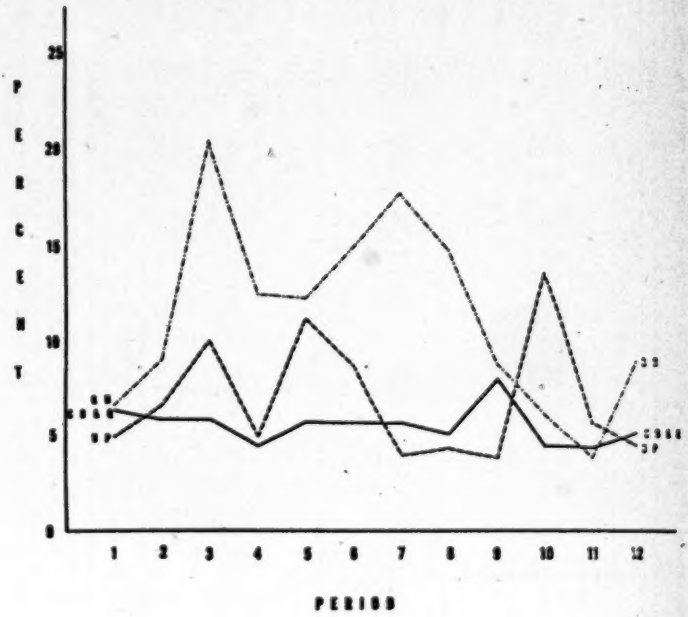
4. Percentage of deficiencies in placements to surplus—deficiencies in placements divided by surpluses.

*Withheld due to high variability in the estimate using the data with substitutions of days.

**Although not suppressed, the estimate based on data with substitutions of days indicates high variability.

APPENDIX E

Boxcar—general service (unequipped) percent of Midwest surplus to total regional surplus—three railroads 12 four-week periods, January 29, 1961 to January 23, 1969, inclusive



APPENDIX E—Continued

Ex Parte No. 252 (Sub-No. 1) Incentive Per Diem Charges—1968, percent of Midwest surplus to total regional surplus—three railroads, boxcars—general service (unequipped), for 12 four-week periods—January 29, 1968, to January 25, 1969, inclusive

Line No.	Item (1)	Time period No. 1 (2)	No. 2 (3)	No. 3 (4)	No. 4 (5)	No. 5 (6)	No. 6 (7)	No. 7 (8)	No. 8 (9)	No. 9 (10)	No. 10 (11)	No. 11 (12)	No. 12 (13)
	Chicago, Burlington & Quincy												
1	Surplus	20,424	21,552	23,352	28,848	32,304	29,856	26,832	23,784	29,520	13,872	13,272	17,352
2	Regional surplus	324,288	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
3	Percent of regional surplus	6.298	5.888	5.859	4.422	5.750	5.686	5.703	5.106	7.910	4.479	4.351	5.146
	Union Pacific												
4	Surplus	16,128	24,216	39,840	32,400	62,544	45,384	18,792	20,064	14,160	41,880	17,088	15,096
5	Regional surplus	324,888	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
6	Percent of regional surplus	4.973	6.616	9.996	4.996	11.132	8.644	3.994	4.308	3.794	13.521	5.602	4.477
	Great Northern												
7	Surplus	21,312	32,808	81,504	80,976	68,352	78,048	83,328	68,664	32,520	18,816	11,592	29,928
8	Regional surplus	324,288	366,048	398,568	652,440	561,816	525,048	470,520	465,792	373,176	309,744	305,016	337,224
9	Percent of regional surplus	6.572	8.963	20.449	12.411	12.166	14.865	17.710	14.741	8.714	6.076	3.800	8.875

1. Surplus—sum of line 2 minus line 7 and line 3 minus line 8 of the data sheet minus line 1 minus line 6 of the data sheet.
2. Percent of regional surplus—surplus divided by regional surplus.

APPENDIX F

Major creditor roads	General service (equipped and unequipped) boxcars					
	New boxcars purchased or built			Rebuilt boxcars		
	1964-68 average	Years More	Average Less	1964-68 average	Years More	Average Less
Akron, Canton & Youngstown	120	2	3	0	0	0
Atchison, Topeka & S.F. Ry	376	2	[8]3	400	4	1
Bangor & Aroostook R	80	1	4	0	0	0
Chesapeake & Ohio	215	1	4	87	1	4
Chicago, Burl. & Quincy R	236	2	3	400	3	1
Denver & Rio Grande Western	81	2	3	0	0	0
Great Northern R. Co	350	2	3	60	1	4
Louisville & Nashville R	170	2	3	367	2	3
Missouri-Kansas-Texas R	0	0	0	0	0	0
Northern Pacific Ry	140	2	[9]3	0	0	0
Pittsburgh & Lake Erie	0	0	0	413	3	1
St. Louis Southwestern Ry	437	3	2	0	0	0
Seaboard Coast Line R	130	3	2	20	1	4
Texas & Pacific Ry	150	2	3	0	0	0
Union Pacific R	2,102	2	[10]3	0	0	0

[8]In one of these years, the A.T.&S.F. purchased or built 300 boxcars.

[9]In one of these years, the NP purchased 136 boxcars.

[10]In two of these years, the purchases were 2,031 and 2,040.

49 CFR Part 1036

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of December 1969.

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

It appearing, That by order of the Commission, dated December 15, 1967, this rulemaking proceeding was instituted for the purpose of implementing those provisions of the law relating to the Commission's authority to encourage the acquisition and maintenance of an adequate car supply as specified in Public Law 89-430, which, effective May 24, 1968, amended section 1(14)(a) of the Interstate Commerce Act:

And it further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed an interim report herein containing its tentative findings of fact and provisional conclusions thereon, including the proposed rules and regulations set forth in the appendix to this order, which interim report is hereby referred to and made a part hereof:

It is ordered, That verified statements of facts, briefs, and statements of position respecting the tentative conclusions reached in the said interim report, the rules and regulations proposed in the appendix to this order, and any other pertinent matter, are hereby invited to be submitted pursuant to the filing schedule set forth below by an interested person whether or not such person is already a party to this proceeding.

It is further ordered, That any person not already a party to this proceeding and intending to participate therein for the first time shall notify this Commission, by filing with the Secretary, Interstate Commerce Commission, Washington, D. C. 20423, on or before January 23, 1970, the original and one copy of a statement of his intention to participate; and that this Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties to these proceedings, upon whom copies of all statements must be served.

It is further ordered, That initial verified statements of facts, briefs, and statements of position in response to the said interim report may be filed on or before February 24, 1970; and that replies thereto may be filed on or before March 24, 1970.

It is further ordered, That any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced.

And it is further ordered, That a copy of this report and order and all appendixes be served upon each respondent, all other parties, each public utility commission or board or similar regulatory body of each State, the Secretary of the Department of Transportation, the Association of American Railroads—Car Service Division, and the American Short Line Railroad Association; that a copy be posted in the office of the secretary of this Commission and in each field office; and that a copy of this order and of the appendix hereto be delivered

to the Director, Division of Federal Register, for publication in the Federal Register.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX

Part 1036—Incentive Per Diem Charges on Boxcars

§ 1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads the additional per diem charges set forth in § 1036.3 on all boxcars shown below,

Mechanical Designation	*Code Number*
XM	B100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMIH	B120-129, B220-229, B320-329
VA	B040
VM	B050
XC	B060
XCI	B070
XU	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Canadian and Mexican owned cars are excepted from the operation of these rules. The rules of this part shall apply to intrastate, interstate, and foreign traffic.

§1036.2 *Amount of incentive charge.*—The incentive charges applicable in each cost bracket by age group are set forth below:

APPENDIX

Amount of incentive per diem on boxcars (collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)	
1	$0- 1,000------	$0.32	$0.27	$0.22	$0.17	$0.11	$0.06		$0.04
2	1- 3,000------	0.65	0.54	0.44	0.33	0.23	0.12		0.07
3	3- 5,000------	1.30	1.09	0.88	0.67	0.46	0.25		0.14
4	5- 7,000------	1.95	1.63	1.32	1.00	0.68	0.37		0.21
5	7- 9,000------	2.60	2.18	1.75	1.33	0.91	0.49		0.28
6	9-11,000------	3.25	2.72	2.19	1.67	1.14	0.61		0.35
7	11-13,000------	3.90	3.26	2.63	2.00	1.37	0.74		0.42
8	13-15,000------	4.54	3.81	3.07	2.33	1.60	0.86		0.49
9	15-17,000------	5.19	4.35	3.51	2.67	1.82	0.98		0.56
10	17-19,000------	5.84	4.89	3.95	3.00	2.05	1.11		0.63
11	19-21,000------	6.49	5.44	4.39	3.33	2.28	1.23		0.70
12	21-23,000------	7.14	5.98	4.82	3.67	2.51	1.35		0.77
13	23-25,000------	7.79	6.53	5.26	4.00	2.74	1.47		0.84
14	25-27,000------	8.44	7.07	5.70	4.33	2.96	1.60		0.91
15	27-29,000------	9.09	7.61	6.14	4.67	3.19	1.72		0.98
16	29-31,000------	9.74	8.16	6.58	5.00	3.42	1.84		1.05
17	31-33,000------	10.39	8.70	7.02	5.33	3.65	1.96		1.12
18	33-35,000------	11.04	9.24	7.46	5.67	3.88	2.09		1.19
19	35-37,000------	11.69	9.79	7.89	6.00	4.10	2.21		1.26
20	37-39,000------	12.33	10.33	8.33	6.33	4.33	2.33		1.33
21	39-41,000------	12.98	10.88	8.77	6.67	4.56	2.46		1.40

§ 1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to such carrier's fleet in accordance with this part.

§1036.4 *Use of funds.*—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase in whole or in part new unequipped boxcars for general service described in paragraph 1, provided the carrier has in the same calendar year already built or purchased its 1964–1968 average number of such boxcars. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided the carrier has in the same calendar year already rebuild its 1964–1968 average number of such boxcars.

§1036.5 *Effective date.*—The rules set forth in this part shall be effective from September 1 of each year through February 28 of the following year.

§1036.6 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day foreign cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended, 49 U.S.C. 1, 12.)

30507

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided April 28, 1970

Upon consideration of verified statements, briefs, and statements of position filed in response to the order accompanying the interim report herein, decided December 12, 1969, the provisional conclusions and rules and regulations embodying those conclusions set forth in that report and order, modified. Rules and regulations governing incentive per diem charges promulgated pursuant to section 1(14)(a) of the Interstate Commerce Act.

Appearances as shown in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, and in the interim report herein, and in addition:

J. H. Anderson, Martin L. Cassell, Richard G. Clemens, Clifford T. Coomes, Fred Diegtel, Richard J. Flynn, R. Guregian, C. D. Haig, Jr., Alfred W. Heese, Jr., John P. Higinbothom, James W. Hoeland, G. T. Honea, Richard A. Hollander, Albert W. Laisy, J. H. McGlothlin, George P. Mueller, Byron D. Olsen, B. David Signan, Walter G. Treanor, T. M. von Sprecken, Jr., and *Sidney Weinberg* for respondents.

John M. Agrey, C. W. Bath, Walter F. Cornick, J. P. Deehan, C. R. Ellenwood, Jr., Roger Fleming, Howard Gould, Donald E. Graham, Donald A. Haakenson, Jon C. Hansen, Glen Hofer, Gus R. Hubbard, Neal A. Jackson, John H. King, Dwight L. Koerber, Horace S. Libby, Frank E. Polom, David Reichert, Dudley J. Russell, F. L. Sigloh, Oliver L. Stewart, Stephen Strauss, and *Henry J. Yunck* for shippers.

REPORT OF THE COMMISSION

BY THE COMMISSION:

In our interim report in this proceeding, 337 I.C.C. 183, of December 12, 1969, we set forth tentative conclusions regarding

the adequacy of the national freight car supply, and announced a provisional judgment with respect to the form and amount of an incentive per diem charge which will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense, in accordance with the provisions of section 1(14)(a) of the Interstate Commerce Act.[1] That report and appendixes, together with the accompanying order, were served on each party, each State public utility body, the Secretary of the Department of Transportation, the Association of American Railroads—Car Service Division, and the American Short Line Railroad Association. The order and its appendix were also published in the Federal Register of December 31, 1969 (34 F.R. 20438). We invited all interested parties to submit verified statements of facts, briefs, and statements of position respecting those tentative conclusions and the proposed rules and regulations contained in the appendix to the order, and any other pertinent matter. The rules and regulations therein proposed, which provide incentive per diem charges on unequipped boxcars, are reproduced in appendix A to this report.

The background leading to the institution of this proceeding is described in the interim report. We there stated the demand

[1]Section 1(14)(a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

for unequipped boxcars cannot be satisfied for at least half the calendar year, and tentatively concluded that an incentive increment added to the basic per diem charge during the fall and winter months, that is, from September through February, would tend to speed the use and return of those cars to their owners, or in the alternative provide a fund to augment the national boxcar fleet. In order to alleviate doubt that the incentive charge would have the desired effect on car supply, we proposed that funds derived from the incentive charge should be "earmarked" and used to purchase or build new unequipped boxcars for general service or to rebuild boxcars. The appendix to the interim order set forth a table of incentive charges proposed to be applied to the boxcars specified in the accompanying rules, depending upon the cost and age of the cars.

PROCEDURAL MATTERS

Certain of the verified statements which were received and various motions include requests for oral hearing.[2] The statements and motions refer to the words "after hearing" in section 1(14)(a), empowering us to establish incentive per diem, and to certain sections of the Administrative Procedure Act, as requiring an oral hearing. This is a rulemaking proceeding as defined in section 551 of the latter act. This agency's interim report and order, with attached appendixes, as noted, were served on each party, and the order and its appendix were published in the Federal Register, in compliance with section 553(b) of that act. No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that act. Cf. *American Trucking Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967).

It must also be understood, as we announced in our interim report, that this is an "open-end" proceeding. Our studies regarding freight car shortage are continuing studies; and we

[2]Those filed by the Penn Central Transportation Company, the Seaboard Coast Line Railroad Company (also on behalf of the Georgia Railroad, the Western Railway of Alabama, the Atlanta and West Point Railroad, and the Chattahoochee Valley Railway Company), the Boston and Maine Corporation, and the Florida East Coast Railway Company; some also request oral argument. The Long Island Rail Road Company filed a separate motion to modify the order accompanying the interim report to provide for an oral hearing, opportunity for cross-examination and presentation of rebuttal evidence, and for the filing of briefs.

will expect the parties to bring to our attention any evidence of circumstances requiring modification of the rules we adopt herein as experience is gained under the new regulations. The Secretary of Agriculture, for example, in a thoughtful statement suggests the holding of hearings after the promulgation of the incentive plan; as the suggested action would be premature at this early date, no such hearings will now be scheduled. Hearings or further proceedings may be necessary later as experience is gained under the incentive plan. In the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern, the requests for oral hearing, cross-examination, and argument are hereby denied. They too may be renewed at a later date as experience is obtained with the incentive charges.

We have carefully reviewed the statements and replies of the parties. For the most part, even when critical of the interim report, they do not raise material or substantial allegations of error in that report. We have considered all the statements, replies, and motions which have been filed. We will discuss these positions, however, primarily as they assist in illuminating the basis for our decision.

Based on the submissions of the parties and the analysis of the 1968 freight car study in the interim report, we herein adopt the rules and the scale of incentive charges attached as appendix B hereto. They differ in certain respects, as will hereinafter appear, from the proposed rules of the interim report, which are set forth in appendix A to this report.

The 1968 Freight Car Study

The nature and results of the 1968 study (appendix A to the interim report) will not be repeated in detail. Briefly, the 1968 study involved a sampling of the demand and supply conditions in 1968 for several different types of freight cars. On the basis of this study, we found that there are insufficient unequipped, general service boxcars to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February.

On January 14, 1969, we entered a further order stating that "refinements in the study program appear desirable." We accordingly proposed that the order initiating the 1968 study be

expanded primarily to include additional car types.[3] No further action was taken with respect to that proposal.

The sampling plan of the 1968 study met all requirements for a scientific survey. The critics of the study point to no specific weakness in it. The validity of the resulting data has been checked, as we stated in the interim report, by the accepted practice of computing standard errors and related coefficients of variation for each cell of collected data. (A statistical "cell" or "data cell" refers to each number having statistical significance. The word derives from the fact that the intersection of a row and a column in a statistical table forms a box or cell.) Some data were rejected due to high variability; but it is not unusual for a few data cells to be rejected in a large and complex study. All of the remaining cells contain data that are statistically valid. The rejection of a few data cells having high variability tends to increase the reliability of the complete study results which are highly acceptable according to probability standards applicable to a complex nationwide sample survey of this kind.

Penn Central seeks to explain some of the delays experienced by shippers by conceding that "a significant proportion (25 percent-30 percent) of all freight stations are served on a less than once-a-day basis." It argues in terms of a Monday-Wednesday-Friday "schedule for deliveries," as if no delay can occur when a carrier has institutionalized a "schedule." Obviously, if its shippers placed orders in the 1968 study for immediate delivery of cars—which were filled late because of the "schedule," or because that day's train had already left, or for any other reason—the shippers nevertheless experienced a delay in service; and such delay, to whatever extent it occurred, is properly considered by us in determining whether the availability of cars was sufficient to meet the shippers' demands for service.

The 1968 study does not assume, as it is alleged, that the railroads must in all cases supply cars for loading within 24 hours. The primary demand factor relied on in the study was comprised of (1) unfilled orders for which placement was requested prior to the study day, (2) orders filed on a prior day requesting placement on the study day, and (3) orders filed on the study day requesting placement on that day. The basic demand statistic, therefore, indicated the carriers' performance in filling orders on a current basis, rather than within 24 hours.

[3] The 1968 study covered 13 types of freight cars. The 1969 order proposed expansion of this coverage to 19 types.

The comment was made in one or more of the statements that no shortage is shown, since only 1.3 cars of every 100 were not furnished in 1968. This comment fails to take into account the long delays experienced by many shippers ordering cars. During the 12-time periods of the study, there were over 273,500 unequipped boxcars delivered after delays of more than 2 days; and 36,000 of those cars were delivered after delays of more than 12 days.[4]

Others seek to equate the percent of failures to place cars with the present of the audits in which overordering was found. No such correlation is possible on the present record. The car placements were made in response to orders for placement on or before the study day, and are unrelated to the study by our car service agents of orders received at certain stations.

Penn Central urges that marketing and operations studies are needed before any incentive per diem may be prescribed. It suggests that such information is "not readily available" without ever stating expressly that the studies are presently unavailable to it. More importantly, Penn Central does not show by any specific evidence that it is unable to improve the utilization of boxcar equipment or expedite delivery of cars on its own lines, or that incentive per diem will not affect utilization. It merely claims, again without specific evidence, that more cars will merely augment the carriers' surpluses.

Certain parties also allege without supporting data that shipper delay is the primary cause of boxcar shortages, and complain that the 1968 study fails to take this into account. We are aware that the boxcar shortage is a many-sided problem. This proceeding seeks to test whether a financial incentive can be employed to augment the car fleet. We do not assume that incentive per diem is the only remedy; on the contrary, we would urge the industry and the shippers to cooperate in studying the causes of whatever shipper delay may exist and to avoid unnecessary delays in the loading and unloading of cars.

The statements of shipping interests of record and our own long experience with the Nation's car service problems support the finding of a national boxcar shortage. The 1968 study, besides affording valid statistical evidence of this shortage, gives us valuable assistance in analyzing the problem and settling

[4] A preliminary staff analysis of the freight car study was presented to the Senate Subcommittee on Surface Transportation. We have not relied on that analysis in the writing of the interim report and this report, and will refer to the underlying data of that analysis only insofar as they are pertinent to our own analysis.

upon the best remedy now available to us consistent with the purposes of section 1(14)(a).

We find that the 1968 study provides us with adequate data to support the action taken in this report and order. We further find, on the basis of this study and the submissions of the parties, that the supply of general service, unequipped boxcars is not adequate to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February. In the interim report and in this report, we have clearly not attempted to resolve all issues concerning the national freight car supply, but only those that permit a logical determination of the requirements for unequipped boxcars. As our study of other car types continues, and as we gain experience under the incentive per diem charges adopted herein, modification or expansion of the rules and charges may well be required.

INCENTIVE PER DIEM CHARGES

Limiting the incentive charge to unequipped boxcars.— The interim report and the adopted rules limit the incentive charges to apply on unequipped boxcars. Several shippers and carriers suggest that the charges should be expanded to apply on more types of cars, such as covered hopper cars.

In this proceeding we are giving first priority to the boxcar. The data we have reviewed clearly show the national boxcar shortage, and indicate wherein an incentive may usefully serve to alleviate the shortage. More study of the data relating to other cars is necessary. Limited application of the incentive charge at the outset should more readily permit us to measure its effectiveness.

The Seaboard Coast Line complains that it will not receive incentive per diem under the proposed rule when its equipped, expensive, and more modern boxcars are on other lines. It overlooks the scale of basic per diem charges,[5] which provide larger per diem payments for the more modern and more expensive cars. For example, for a $5,000 boxcar that is 20 years old, the basic per diem (time charges) is $1.50; but for a 5-year old boxcar costing, let us say, $16,000 the basic per diem (time charges) is $4.45.[6] Seaboard, like all other carriers that

[5] As prescribed in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 333 I.C.C. 176 (1968).

[6] See also interim report, appendix B.

have continued to purchase the new and more expensive cars, will receive fair compensation.

The issue presented, however, chiefly concerns how best shall we move forward to enlarge the boxcar fleet. The economies to be realized in the operation of certain cars and the competitive need for specialized equipment provide incentives for the carriers to continue their purchases of those cars. In the meantime, the boxcar remains the "workhorse" of the fleet, and we have not been shown evidence that it can or will be replaced in that role. On the contrary, its primary role remains and yet the number of boxcars in active service has declined, resulting in the unsatisfied demand that the 1968 freight car study helped us to analyze. The interim report proposed a logical beginning to meeting this problem under section 1(14)(a).

Amount of incentive per diem on unequipped boxcars.—We have proposed, and we herein adopt, an incentive per diem on unequipped boxcars based upon increasing the rate of return on investment allowed car owners in the basic per diem proceeding from 6 percent per year to an overall 12 percent per year. As we stated in the interim report, such a rate should bring returns on investment in unequipped boxcars comparable to the higher average returns earned by nonregulated corporations,[7] thereby making investment in the national boxcar fleet a desirable alternative investment.

The parties propose a number of alternative approaches to the amount of incentive charge. One carrier proposes a flat rate of $5 per car regardless of the car's age or cost; another proposes a variable charge; and others merely seek to have us impose unspecified higher charges.[8] No evidence was produced by these parties beyond the opinions of certain railroad officials, with whom other officials and shippers disagreed, that the proposed scale would be ineffective as an incentive. As one railroad official stated,

* * * To flatten the rate would be to overreward the owner of the older, obsolescent cars, and to under-reward the owner of newer, more modern cars. The

[7]The rate of return was computed from balance sheet and income figures compiled by the Internal Revenue Service, and included corporations having no income in the period as well as corporations earning very high rates of return. The study in our view produced a reasonable average figure reflecting the typical experience of unregulated companies and a gauge of the incentive to disinvest in the railroad industry, and hence a reasonable measure of the incentive needed to encourage such investment.

[8]Several parties urge that the proposed incentive scale is too high; but none has shown that the proposed charges would impose an undue burden on it or on any group of carriers.

new cars get more use; they are able to carry more lading; they need less "down time" for maintenance and repair; and they have many advantages over older cars, deriving from the constant development of the technology of car design and construction. A flat rate is not as much of an incentive to the acquisition of new cars as is a rate scale related to age and original cost.

The data we have seen convince us that no higher average rate of return than 12 percent is needed to serve as a reasonable incentive, and that a higher figure would, therefore, provide unjust and unreasonable compensation to freight car owners.

Besides the potential rate of return, there are several other factors arising out of this proceeding that should tend to produce a renewed consideration of investment in the boxcar fleet by the railroad industry. The earmarking requirement, which we considered in the interim report and adopt herein, is a significant factor. But beyond that requirement, certain debtor roads will also be given an incentive to invest in the boxcar fleet.

As we stated in the interim report, we cannot be certain that the incentive per diem will increase the car fleet by any substantial number, or, if it succeeds in that respect, that it will alleviate the car shortage. Nevertheless, we believe the new charges coupled with the rule governing the implementation of the charges should produce improvements over a period of years.

Some of the parties seem to desire an unattainable certainty regarding the effect of our decision before any decision is reached and prior to the implementation of the statute. Only with actual experience can we determine the precise effect our decision will have; and for this reason, among others, we have emphasized that this proceeding will remain open for the submission of representations and data as experience is gathered under the new incentive charges.

Six-month application of the charges.—In the interim report we proposed to apply the scale of incentive charges over a period of 6 calendar months of each year. The report proposed that the carriers earn a rate of return of 6 percent as part of the basic per diem in the March–August period, and a rate of return of 18 percent in the September–February period through both the basic and incentive charges. An overall 12-percent rate of return would result for the annual period.

As we stated in the interim report, the use of an 18-percent return in the heavy-loading period should stimulate the faster return of cars in a period showing a regional imbalance in car

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supply, and should stimulate some debtor railroads ("debtor" in terms of net per diem balances) to purchase cars. The entire incentive amount would apply in the heavy-loading period of most debtor roads and hence in their period of greater ability to pay—or to invest in equipment.

A few railroads suggest that the September to February period does not reflect *their* heavy-loading period; others suggest that incentive per diem should apply throughout the year. The 1968 data show the September-February period was a heavy-loading period both nationally and regionally. The few exceptions of record do not disprove the findings based upon this data. Moreover, the individual need of particular carriers for cars in the March through August period can be remedied by service orders or car distribution directives. In the meantime we seek national solutions to the national 6-month shortage.[9]

The effect of a 6-month application of the incentive rate of return should be to improve performance over a 12-month application of such return. The 6-month allowance of an 18-percent rate of return should bring to the creditor lines a reasonable annual return of 12 percent,[10] plus the additional benefits resulting from a bunching of the incentive element in the 6-month period. If better utilization results from this bunching of the collection of the incentive return, as we believe it will, the effect of better utilization should also spill over into the other months.

Another matter relating to the application of the incentive charge raised by the parties concerns the length of time it will apply. We cannot now foresee the termination of the incentive charge. The shortage of boxcars has been with us for years, and will not easily be solved, nor remedied in the near future. We do not reach any of the several problems suggested by a few railroads that might arise upon the termination of the incentive charges. None of the problems seems insurmountable, and each can be resolved when a discontinuance of the incentive is in fact considered.

Earmarking requirement.—We proposed in the interim report that net incentive balances, i.e., the excess of incentive charges

[9]Penn Central argues that the lack of local conditioning and storage facilities for grain is "the base problem;" but quickly adds that "service orders which move cars interregionally do not solve the problem. They merely shift it to another location," apparently conceding the national shortage of cars.

[10]Of course, we could not increase the incentive rate of return to 18 percent throughout the year, since an overall annual rate of return of 18 percent would exceed a reasonable level of compensation to freight car owners.

received by a railroad over those paid by it, should be set aside as earmarked funds for the purchase, building, or rebuilding[11] of general service, unequipped boxcars. We did not specify any particular size of boxcar, but only that it must be an unequipped and general service boxcar.

We adopt the earmarking requirement in our final order. We believe the various fears expressed by the parties—that earmarking will unduly restrict the investment of railroad funds, or even provide an overabundance of boxcars—have not been supported. Earmarking, as the spokesman for the Southern Railway System Lines aptly states, alone insures that the funds will be used as intended and hence is "the key to accomplishing the objective of the plan."

The statute, of course, does not seek to remedy any alleged "imbalance" in the ownership of cars between creditor and debtor railroads. Besides the fact that no particular national advantage would necessarily flow from having the debtor roads own all cars purchased from incentive funds, the statute requires us to recognize and preserve entitlement to incentive charges based on the ownership of cars when it refers to an incentive charge that provides "just and reasonable compensation to freight car owners."

We do not foresee an overabundance of plain boxcars on line of the owning roads as a result of the incentive charge. Such roads are generally the very railroads that show the most serious need for cars in the heavy-loading season. The parties making this charge present no data or any study to support their contention.

As in the interim report, we do not prescribe the timing of purchases. If traffic of particular roads falls off, they may desire to postpone purchases. The earmarked funds must eventually, however, find their way into the purchase, building, or rebuilding of the general service, unequipped boxcar, the type of car we have found to be in short supply.

In the absence of earmarking, the net incentive balances would obviously be deposited in the general funds of the railroads, which could then be expended for many purposes having little or nothing to do with the purposes of the statute. The statute was not adopted to provide the railroads with merely

[11] By "build," "rebuild," or "purchase" we refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

increased compensation for the use of cars. Such a result furthermore would be contrary to our findings in the basic per diem proceeding.

The net balances derived from the incentive charge are not properly part of the general working capital of the recipient railroad. Railroad cars other than boxcars are not here found to be in short supply; purchases of such other cars, or for that matter, funds to make road improvements, must come from other sources. On the other hand, one of the subjects for future study, as the incentive program progresses, must also be the interchangeability, if any, of other types of cars with plain boxcars. Complete interchangeability between the boxcar and any other type is not shown of record.

The witness for the Southern Railway suggests a modification of the earmarking requirement to provide for earmarking of only the net balances after income taxes. The suggestion has merit and our form of the modificaton will be incorporated in the adopted rules.[12]

Five-year average.—The rule we proposed and herein adopt would require the beneficiary of the net credit balances resulting from incentive per diem to expend those balances only for building or purchasing new general service, unequipped boxcars, or for rebuilding older cars of such type, beyond their normal outlays of funds for such purposes. We accepted each carrier's average number of cars purchased, built, or rebuilt in the 5-year period 1964–1968 as representative of their current outlays. Our purpose here is to insure not only that the incentive charges are used for the purpose intended (and hence "earmarked"), but also that the incentive program stems the present downtrend in the national supply of plain boxcars.

Some railroads urge that the 5-year average penalizes those roads which purchased or acquired a larger than average proportion of the total purchases of general purpose boxcars in the period. They add that, similarly, those roads which purchased less than the average are rewarded by being permitted to more readily draw down funds. There is no showing that any expenditure for boxcars during the 5-year period was

[12] We later provide for the inclusion in the incentive program of the Canadian lines and intend that a Canadian line shall transfer the net incentive balances to a United States carrier for investment. The Canadian line would transfer balance net of taxes and its transferee would invest the net balance without any further deduction for taxes. The plan is discussed in detail at a later point in this report.

made in expectation of the interim report. Each railroad that purchased cars, or delayed its purchases, did so for business reasons unrelated to this proceeding. Contrary to what a few carriers allege, we here recognize there were many managerial decisions underlying the purchase or failure to purchase boxcars, and the building or rebuilding and failure to build or rebuild boxcars, in the past. We merely plan a future course with those decisions fully in view.

There is no "reward" and there is no "punishment" in fact or intended in our use of the 5-year average. If the Congressional purposes to augment the car fleet and to improve utilization are to be met, there must be some base from which to build. Otherwise, there is no standard to measure and hence prevent the continual decline of the boxcar fleet. In the absence of the 5-year average, the creditor railroads could simply use the the incentive funds to purchase their ordinary car replacements and maintain the present declining rate of such replacements. This would not be a satisfactory response to the shipper requirements for additional boxcars shown of record.

One of the parties suggests a "moving average" as an alternative to the 1964–1968 period average. The moving average would apparently be reconstructed each year by using the more current year as the fifth year in the computation and by dropping the oldest year. Such an approach, however, would dilute the average, and bring the same decline in boxcar supply which we have seen in the past. A moving average would reward creditor carriers, which failed to buy any cars in future years, with a declining requirement to buy cars. A moving average would not, therefore, be a suitable substitute for the 1964–1968 period.

A somewhat different approach is suggested by another party. Rather than make a frontal attack on the average, one of the parties suggests that a carrier should not be required to make up accumulated arrearages in its car purchases after making the average purchases in any one year. For example, if a carrier purchased no boxcars in the first year under the incentive order, and none in the second year, the suggestion is that the carrier should be required to purchase only its 1964–1968 average in the third year before dipping into the earmarked funds. Like the moving average, this approach would merely dilute the requirement of prior average purchases before using earmarked funds; and we have, accordingly, added clarifying language to section 1036.4 of the adopted rules.

In the interim report, we stated that for some carriers "it may be relatively easy to gear annual purchases to their 5-year average. For others, it may be necessary to defer annual purchases from the fund until the need arises for the purchase of cars in excess of the 5-year average." We here referred to the practice of many railroads of buying large quantities of equipment at one time, rather than a uniform amount each year. We did not seek to require each railroad to purchase or build an annual number of cars uniformly corresponding to its 1964-1968 average. We likewise did not intend to excuse a railroad when it accumulated a quantity of underpurchases from a prior period.

To illustrate our meaning, let us postulate two carriers ("A" and "B") each having a 1964-1968 average of 100 annual boxcar purchases. Let us further assume the following purchases in the first 3 years following our adoption of the incentive order:

Year	Boxcar purchases	
	Carrier "A"	Carrier "B"
1	0	0
2	0	0
3	400	100

We intend that carrier "A" should be permitted to purchase 100 general service, unequipped boxcars in the third year by using any portion of the earmarked funds; the first 300 boxcars purchased in the third year would have to be financed solely from other funds. Carrier "B," on the other hand, would not be permitted to use any of the earmarked funds for purchase of any of the 150 cars in the third year. It accumulated in our hypothesis a backlog of 200 cars in the first 2 years, and would be required first to purchase those cars, plus another 100 for the third year, before using earmarked funds.

We shall continue to rely on the 1964-1968 period.[13] We have not been shown evidence that any road purchased an excessively high number of boxcars in that period for tax reasons or any other reason. The period is long enough and yet recent enough to provide, as we stated in the interim report, a fair gauge of

[13] Southern proposes a change in the language of section 1036.4 which we do not adopt. It suggests striking the words "its 1964-1968" in the two places they appear, and adding at the end of each sentence "that it built or purchased annually during the years 1964 through 1968." We do not intend that a carrier first purchase from other funds what it purchased "annually," but rather that it first purchase its 1964-1968 average.

the current, albeit inadequate, response of the railroad industry to the demonstrated need for additional boxcars.

REQUESTS FOR EXEMPTION AND INCLUSION

Requests for exemption.—Section 1(14)(a) authorizes this Commission to exempt a "group of carriers" from paying an incentive element if found to be in the national interest. An earlier version of the statute in the Senate authorized an exemption to specified carriers, such as those "which terminate a substantially higher percentage of interline traffic than they originate."[14] The more general language adopted by Congress grants both the power and the duty to exempt a group of carriers only when this Commission finds it to be in the national interest.[15]

The Louisville and Nashville Railroad (L&N), proposes that all carriers be exempted from paying incentive per diem for the first 15 days after each interchange. The L&N argues that such an exemption would induce the prompt return of cars and at the same time provide "a reasonable length of time" for the using line to handle the car efficiently. It nowhere supports a standard of 15 days; and we fail to see how such a lengthy period would be justified for each and every haul of any length following interchange. Another basic objection to the L&N's approach is that it confuses the objectives of incentive per diem with "penalty per diem," a matter that has been discussed in the context of the Commission's authority under section 1(15) of the act.[16] The exclusive purpose of the penalty would be better utilization. Unlike penalty per diem, an important function of incentive per diem is to create a fund and incentive for the acquisition of boxcars.

Several railroads seek the exemption of different groups of carriers from payment of the incentive per diem. The Long Island claims that Congress intended to exempt all the predominantly terminating railroads of the Northeast section of the Nation. In its view, once a railroad establishes that it terminates more cars than it originates, thereby experiencing a surplus of cars on its lines, it is entitled to an exemption. It also alleges that "the large percentage of detention" occurs on its lines "while the car

[14] S. 1098, 89th Cong., 1st sess.

[15] See, *e.g.*, remarks of Senator Cotton, 112 Congressional Record 10250-51 (1966).

[16] *E.g.*, see "Review of I.C.C. Policies and Practices," Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st sess., pages 105, 343-44.

is in shipper hands;" it, therefore, avers that incentive per diem would not cause it to acquire cars, in view of the large number of surplus empties continuously on its tracks, but merely add to its deficit freight operations. The Florida East Coast Railway, among others, makes similar arguments in favor of an exemption. It shows that, as a predominantly terminating railroad, it continuously has a surplus of boxcars on its lines, and asserts that it now operates efficiently and possesses a sufficient number of cars to protect its loadings.

We have given careful consideration to the requests of the several terminating railroads for an exemption. In our view, it would not be in the national interest to exempt a group of carriers merely because they terminate a substantially greater number of carloads than they originate, or because they already own a sufficient number of cars to satisfy their own needs.

The statute requires incentive per diem both to contribute to car utilization and distribution, and to encourage the acquisition and maintenance of an adequate car supply. The terminating roads that have requested an exemption argue that they cannot be expected to add to the national car fleet by direct purchase; nevertheless, they can be expected to contribute to improved car utilization, given the incentive to do so. Moreover, a terminating railroad, like any other railroad, has a substantial interest in the maintenance of a national car supply, whether by direct purchase, or indirectly by better enabling the creditor roads to augment the car fleet.

The statute also refers to providing just and reasonable compensation to freight car owners. As we explained in the interim report, this refers to compensation for risks beyond those included in the basic per diem charges which may be considered by us in seeking to alleviate a shortage of cars. The terminating roads should in fairness bear a portion of the cost of these additional risks.

The terminating lines complain that, unlike debtor per diem railroads such as Penn Central, they do not as a practical matter have the choice to purchase additional equipment or to pay incentive per diem. Their purchase of additional equipment may not be economically feasible. But our giving carriers such as Penn Central the choice denied to the terminating lines has not lessened the burden on Penn Central. The debtor railroads are treated equally, since the financial cost to those carriers that decide to purchase cars directly will not be any less, and may be more, than the cost of incentive per diem.

The argument is made that the incentive charges should not apply to a bridge carrier which is required to receive cars as a connecting railroad for delivery to another railroad. Such a carrier would pay incentive per diem for the same reason it pays basic per diem, namely, that as a bridge carrier it enjoys a division of the revenue and hence should bear a portion of the expense and investment. A like response pertains to the argument that incentive charges should not apply when a car movement is outside the "control" of a particular railroad, such as in the hands of a shipper for loading or unloading. Both basic and incentive per diem charges place the burden on the carrier nearest in time (and generally distance) to the point of loading or unloading, and among all other railroads (including the owner), such a carrier fairly bears the per diem burden.

While a car is under load, the road on which the car is located benefits from use of the car, and it is only logical that the road should be charged with the capital costs of using the car. Incentive per diem charges represent such costs because they are required in order to stimulate the amount of investment in freight cars necessary to provide adequate car service. Railroads also look to the handling of loaded cars as an area for improvement in overall car utilization. Improved yard and communications facilities help expedite the movement of loaded cars through terminal areas and through the classification process. Incentive per diem charges while cars are under load should tend to encourage investment in those facilities. Even when cars are under the control of shippers and consignees, the car days consumed in such use should be accounted for in freight revenues from the loaded movements associated with the free loading and unloading time. Charging the railroads incentive per diem while cars are under shipper control should induce the roads to be more attentive to the proper application of demurrage charges.

The Boston & Maine Railroad (B&M), in a "statement" of its attorney suggests it "intends to adduce evidence" which will show that an exemption should apply to "many railroads" on account of their dire financial condition or markedly lower rate of return on investment. Since B&M presented no evidence of such a condition applicable to any railroad, as it alleges, we fail to see the pertinence of its allegation. B&M and other carriers emphasizing their financial condition either fail to show the dollar impact of the proposed incentive per diem at all, or having shown the dollar cost fail to demonstrate that such cost is a substantial portion of their

revenue and is unduly burdensome. In addition, the basic per diem costs of some carriers should be less than their present costs when the new scale of basic charges becomes effective. They further fail to show that the burden, if any, should somehow take precedence in the national interest over the role a terminating railroad can play in the Congressional plan for augmenting the national car fleet and improving car utilization.

The switching and terminal carriers that seek an exemption do not show such an exemption to be in the national interest. These carriers pay per diem on all cars they handle subject to a reclaim allowance from the connecting trunkline carrier. For the first 7 days that cars are in its control, the Brooklyn Eastern District Terminals, for example, is entitled to reclaim of per diem from the line-haul carriers, which will also apply to incentive per diem. The New York Dock Railway, on the other hand, pays no per diem. No showing is made that the payment of incentive per diem will substantially increase the per diem bills of any of these railroads; but even if an increase will occur, it will occur only after the expiration of reclaim periods, which should be adhered to, or perhaps renegotiated, or if too restrictive, prescribed by us.[17]

Incentive per diem will, like basic per diem, be subject to the present reclaim arrangements between railroads. The switching and terminal railroads, therefore, will be liable for incentive per diem just as they now are liable for the basic per diem payments.

Rate and division adjustments may be required as a result of incentive per diem. We do not reach the questions inherent in the statements filed by several carriers, for example, as to whether there should be any increase in the tariff rates and charges on account of increased per diem costs. Any such proposals must be presented to us in tariff form subject to the statutory notice provisions and our authority to suspend and to investigate.[18]

A few switching and terminal companies and short lines urge an increase in demurrage to offset incentive per diem.[19] Since

[17]The Terminal Railway Alabama State Docks, a railroad wholly owned by the State of Alabama, alleges that it cannot prevent intrastate shippers from defeating the incentive charge. It argues that as a matter of State law, a penalty charge for the use of equipped boxcars applies to interstate, but not intrastate, shippers, and, accordingly, intrastate shippers may shift to the use of the more valuable equipped boxcars at a lesser per diem cost. The State's self-imposed limitation on applying the penalty charge should not defeat incentive per diem; rather, the practice may unduly discriminate against interstate commerce and hence be an unlawful practice governing intrastate shippers.

[18]Similarly, rate adjustments may be required for intraterminal, interterminal, post and intraplant switching. We express no opinion.

[19]Other switching and terminal carriers argue, on the other hand, that increased demurrage would simply result in loss of traffic.

the line-haul rates necessarily reflect the present cost to the carriers of the free-time allowance, free time at the ports, and demurrage, it may be that the incentive charge will require future adjustment to reflect the increased per diem costs. However, no evidence has been presented on these questions, and the new basic per diem charges should decrease the per diem costs of some railroads. Accordingly, we do not reach the effect of incentive charges on free-time allowances and demurrage charges on this record. We will entertain specific proposals from the carriers to deal with such questions when the need and the evidence are presented.

In this area, as in others relating to incentive per diem, we do not close the door to later revision of our order. Following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding. Accordingly, we are unable to find that it would be in the national interest to exempt any groups of railroads from the payment of incentive per diem charges at this time.

Requests for inclusion.–The interim report exempted all Mexican and Canadian railroads from the payment of incentive per diem. Eleven Canadian railroads request to be included in the incentive program. The two major Canadian railroads are the Canadian Pacific Railway Company and the Canadian National Railways. The former is a publicly owned stock company and the latter is wholly owned by the Government of Canada.

The Canadian Pacific was incorporated pursuant to an act of the Parliament of Canada in 1881, and currently operates over 16,000 miles of railway in the United States and Canada. Among its controlled lines in the United States is the Soo Line Railroad Company. Canadian Pacific owns 704,953 shares of common stock of the Soo Line, and has power to vote an additional 7,850 shares, which together constitute 56.37 percent of the total voting power evidenced by the Soo Line's outstanding shares. The Soo Line owns over 6,000 general service, unequipped boxcars, and over 1,500 general service equipped boxcars.

The Canadian National operates over 23,000 miles of main-line track in Canada and the United States. It maintains numerous connections with United States carriers. It has three wholly owned subsidiaries which operate entirely in the United States, including the Central Vermont Railway, the Grand Trunk Western Railway

(which owns and operates 879 miles of track), and the Duluth, Winnipeg and Pacific Railway.

The additional eight Canadian railroads, which join in the request for inclusion, are the following:

Algoma Central Railway
Canada and Gulf Terminal Railway
Essex Terminal Railway
Napierville Junction Railway
Northern Alberta Railways
Ontario Northland Railway
Roberval and Saguenay Railway Company
Toronto, Hamilton and Buffalo Railway

Each of these carriers is a private or public stock company, except the Ontario Northland, which is owned by the Government of Ontario; and the Northern Alberta Railways, which is owned in part by the Canadian National and in part by the Canadian Pacific.

These railroads argue in a joint pleading that per diem charges must be uniform throughout Canada and the United States. If incentive did not apply to Canadian cars, the Canadian railroads state, (1) United States carriers would, whenever possible, use the many Canadian cars that come into this country and unduly delay their return to Canada; and (2) originating United States carriers would tend to promote the routing of their cars via United States lines (to earn greater per diem), and hence discourage use of possibly faster Canadian routes. As part of the delayed return of Canadian cars, the Canadian roads foresee that their cars would be loaded last in the United States, held for loading more often than comparable United States cars, repaired last, and used for traffic where the cars are slow in releasing.

The data presented by the Canadian National and the Canadian Pacific show the following distribution of boxcars in heavy-loading period (September-February) since 1964:

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Canadian National Boxcars

Period	CN total average inventory	CN boxcars on U.S. lines		U.S. boxcars on CN lines	
		Average	Percent[1]	Average	Percent[1]
September-February 1964-1965	56,853	10,296	18.3	4,603	8.2
September-February 1965-1966	55,454	10,917	19.7	4,917	8.9
September-February 1966-1967	55,556	9,688	17.4	4,394	7.9
September-February 1967-1968	56,645	9,433	16.7	3,027	5.3
September-February 1968-1969	57,019	11,496	20.2	3,663	6.4

Canadian Pacific Boxcars

Period	CP total average inventory	CP boxcars on U.S. lines		U.S. boxcars on CP lines	
		Average	Percent[1]	Average	Percent[1]
September-February 1964-1965	51,056	8,589	16.8	2,214	4.3
September-February 1965-1966	51,357	9,546	18.6	2,663	5.2
September-February 1966-1967	50,694	8,056	15.9	2,370	4.7
September-February 1967-1968	49,063	6,973	14.2	2,213	4.5
September-February 1968-1969	48,422	8,008	16.5	2,397	5.0

[1]Percentage of total inventory.

The data indicate that a substantial number of Canadian boxcars are on United States lines in the heavy-loading period, and that these Canadian carriers are substantial creditor lines insofar as per diem payments are concerned. The data also show that by far the major portion of the Canadian fleet is in service within Canada during this period, and that the level of United States usage of Canadian cars has not substantially varied from year to year.[20]

The Canadian railroads present a convincing argument that the complete elimination of the Canadian railroads from the incentive program could create dislocation of equipment and reduce car utilization. We are not convinced, however, that their inclusion in the program on the same footing with United States carriers can as a practical or legal matter be accomplished.

[20]Similar findings pertain to the annual data of record for the two Canadian roads.

The Canadian railroads are subject to our jurisdiction only to the extent they operate within the United States. They do not file annual reports of their entire operations with us. The Canadian National, for example, states on this record that it owns 55,401 boxcars as of January 1, 1970. For the year ended December 31, 1969, its relatively minor lines operating in the United States reported the following ownership of boxcars in their respective annual reports to us:

Reporting carrier	Reported boxcars owned
Canadian National Lines in Michigan	None
Canadian National Lines in New England	1
Canadian National Lines in New York	None
Canadian National Lines in Vermont	None

Besides the paucity of data, the Canadian lines appear to concede that our lack of control over their operations could lead to divergencies from the rules we adopt to govern the application of the incentive charges.

A further serious question is presented by the fact that the application of incentive charges on Canadian cars, and full compliance with earmarking, could not likely increase the number of Canadian cars in the United States. On the contrary, even if the Canadian carriers fully complied with our order on a voluntary basis, the practical effect of incentive charges would likely be that United States carriers would be paying for the enlargement of the boxcar fleet *within* Canada.

It seems clear to us, therefore, both that the Canadian railroads are entitled to relief from the specific problems they describe, and that special rules must apply to the Canadian railroads, if they are to be included in the incentive program. Let us then turn to the specific problems described by those railroads.

First, the Canadian railroads allege that originating United States carriers may route the cars owned by United States railroads around Canada rather than over the more direct Canadian routes. This is more a problem of the application of the incentive charges on United States cars than on Canadian cars; and hence we find that incentive charges should continue to apply on United States boxcars whether moving within the United States or in Canada, in the same manner that basic per diem applies to United States cars while in Canada.

Second, the Canadian railroads maintain that United States carriers will unduly delay the return of Canadian cars, if incentive charges do not apply to the latter cars. To remedy this difficult, but clearly potential, problem we find that incentive charges shall apply on Canadian boxcars in like manner and subject to the same rules applicable on United States boxcars with the exceptions described below.

In section 1036.1, set forth in appendix A of this report, the phrase "the owning railroads" shall be changed, as it applies to Canadian carriers, and the following will be added:

or the United States class I railroad which is designated by the owning railroads of Canada, * * *

We will add at the end of the first sentence of section 1036.3: "and shall maintain separate accounts for funds received on Canadian owned boxcars." And we will add the following new third sentence in section 1036.4: "Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964–1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964–1968 average." These provisions should insure that the Canadian funds do not dilute the incentive rules as they relate to the United States railroad receiving the net balances on Canadian cars.

The Canadian National and the Canadian Pacific should have no difficulty in designating their major United States subsidiaries to receive the incentive per diem on their cars. We are not advised concerning the number of cars owned by the smaller eight Canadian railroads. If they anticipate or in fact experience unusual difficulties in designating a recipient of the charges, we will entertain specific proposals from them.

Clearly, by having the incentive charge apply on Canadian cars and yet be payable to a United States carrier, we both solve the specific problem of delayed return of cars described by the Canadian roads, and the new problems that would be created if the incentive charges applied without the changes we have directed. The incentive charges, subject to the rules for their application, as modified herein, will accord fair and reasonable treatment of the Canadian carriers.

ULTIMATE FINDINGS

We find and conclude that the rules and charges set forth in appendix B hereto will provide just and reasonable compensation to owners of general service, unequipped boxcars, contribute to sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

An appropriate order will be entered.

COMMISSIONER BUSH, being necessarily absent, did not participate.

APPENDIX A

Rules and regulations proposed in the interim report

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

§1036.1 *Application.*—Each common carrier by railroad subject to the Inter-State Commerce Act shall pay to the owning railroads the additional per diem charges set forth in §1036.3 on all boxcars shown below,

Mechanical designation	Code Number
XM	B100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMH	B120-129, B220-229, B320-329
VA	B040
VM	B050
XC	B060
XCI	B070
XU	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Canadian and Mexican owned cars are expected from the operation of these rules. The rules of this part shall apply to intrastate, interstate, and foreign traffic.

§1036.2 *Amount of incentive charge.*—The incentive charges applicable to each cost bracket by age group are set forth below:

Amount of incentive per diem on boxcars (collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	$0- 1,000-----	$0.32	$0.27	$0.22	$0.17	$0.11	$0.06	$0.04
2	1- 3,000-----	0.65	0.54	0.44	0.33	0.23	0.12	0.07
3	3- 5,000-----	1.30	1.09	0.88	0.67	0.46	0.25	0.14
4	5- 7,000-----	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7- 9,000-----	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000-----	3.25	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000-----	3.90	3.26	2.63	2.00	1.37	0.74	0.42
8	13-15,000-----	4.54	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000-----	5.19	4.35	3.51	2.67	1.82	0.98	0.56
10	17-19,000-----	5.84	4.89	3.95	3.00	2.05	1.11	0.63
11	19-21,000-----	6.49	5.44	4.39	3.33	2.28	1.23	0.70
12	21-23,000-----	7.14	5.98	4.82	3.67	2.51	1.35	0.77
13	23-25,000-----	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000-----	8.44	7.07	5.70	4.33	2.96	1.60	0.91
15	27-29,000-----	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000-----	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	31-33,000-----	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000-----	11.04	9.24	7.46	5.67	3.88	2.09	1.19
19	35-37,000-----	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000-----	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000-----	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from incentive per diem settlement involving boxcars subject to this part. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to such carrier's fleet in accordance with this part.

§1036.4 *Use of funds.*— The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase in whole or in part new unequipped boxcars for general service described in paragraph 1, provided the carrier has in the same calendar year already built or purchased its 1964-1968 average number of such boxcars. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided the carrier has in the same calendar year already rebuilt its 1964-1968 average number of such boxcars.

§1036.5 *Effective date.*—The rules set forth in this part shall be effective from September 1 of each year through February 28 of the following year.

§1036.6 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day foreign cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended, 49 U.S.C. 1, 12).

APPENDIX B

Adopted rules and regulations

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

§1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads or the United States class I railroad which is designated by the owning railroads of Canada the additional per diem charges set forth in §1036.2 on all boxcars shown below,

Mechanical designation	*Code number*
XM	B100-109, B200-209, B300-30
XMI	B110-119, B210-219, B310-31
XMIH	B120-129, B220-229, B330-33
VA	B040

Mechanical designation	Code number
VM	B050
XC	B060
XCI	B070
XU	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce.

§1036.2 *Amount of incentive charge.*—The incentive charges applicable in each cost bracket by age group are set forth below:

Amount of incentive per diem on boxcars (Collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	$0- 1,000-----	$0.32	$0.27	$0.22	$0.17	$0.11	$0.06	$0.04
2	1- 3,000-----	0.65	0.54	0.44	0.33	0.23	0.12	0.07
3	3- 5,000-----	1.30	1.09	0.88	0.67	0.46	0.25	0.14
4	5- 7,000-----	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7- 9,000-----	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000-----	3.25	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000-----	3.90	3.26	2.63	2.00	1.37	0.74	0.42
8	13-15,000-----	4.54	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000-----	5.19	4.35	3.51	2.67	1.82	0.98	0.56
10	17-19,000-----	5.84	4.89	3.95	3.00	2.05	1.11	0.63
11	19-21,000-----	6.49	5.44	4.39	3.33	2.28	1.23	0.70
12	21-23,000-----	7.14	5.98	4.82	3.67	2.51	1.35	0.77
13	23-25,000-----	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000-----	8.44	7.07	5.70	4.33	2.96	1.60	0.91
15	27-29,000-----	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000-----	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	31-33,000-----	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000-----	11.04	9.24	7.46	5.67	3.88	2.09	1.19
19	35-37,000-----	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000-----	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000-----	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part, and shall maintain separate accounts for funds received on Canadian owned boxcars. During any calendar year in which the carrier pays income taxes subject to a tax ruling governing incentive balances, the amount required to be earmarked by the carrier hereunder (or transferred by the Canadian carrier to its designee) shall be reduced by the applicable statutory percent, or by the percentage derived from dividing the income taxes in fact paid by the carrier by its net income, whichever percentage is less. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in §1036.1 for addition to such carrier's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in government bonds or other interest-bearing, temporary securities. The interest earned thereafter will become part of the earmarked fund.

§1036.4 *Use of funds.*—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase, in whole or in part, new unequipped boxcars for general service described in paragraph 1, *provided*, the carrier has in the same calendar year built or purchased its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided, the carrier has in the same calendar year rebuilt its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964-1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964-1968 averages. As used in this section, "build," "rebuild," or "purchase" refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

§1036.5 *Effective date.*—The rules set forth in sections 1036.1 and 1036.2 of this part shall be effective from September 1 of each year through February of the following year.

§1036.6 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended, 49 U.S.C. 1, 12).

337 I.C.C.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1036 - INCENTIVE PER DIEM CHARGES ON BOXCARS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of April 1970.

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the interim report herein, are made a part hereof.

It is ordered, That chapter X of title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part 1036, Incentive Per Diem Charges on Boxcars, reading as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required to observe, enforce, and obey the rules and regulations concerning incentive per diem charges on boxcars, as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required (1) to observe, enforce, and obey any annual or special reporting requirement which shall be issued hereafter in or pursuant to this proceeding, and (2) to retain all incentive per diem reports made and received, including reclaims, and all incentive per diem discrepancy and adjustment reports.

It is further ordered, That the rules and regulations prescribed in appendix B to the said report shall be published in the Federal Register.

It is further ordered, That this order shall take effect on June 1, 1970.

And it is further ordered, That this order shall continue in full force and effect until the further order of the Commission.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

337 I.C.C.

APPENDIX E

In the United States District Court Middle District of Florida, Jacksonville Division

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Civil Action (No. 70–574–Civ–J)

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, FLORIDA EAST COAST BUILDING, ST. AUGUSTINE, FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Civil Action (No. 70–577–Civ–J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

NOTICE OF APPEAL

I. Notice is hereby given that the United States of America one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order entered by this Court on February 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to

transmit the entire record to the Clerk of the Supreme Court.

This the 15th day of April, 1971.

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

RICHARD W. MCLAREN,
Assistant Attorney General.

JOHN L. BRIGGS,
United States Attorney,
Jacksonville, Florida 32201.

APPENDIX F

In the United States District Court Middle District of Florida, Jacksonville Division

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(Civil Action No. 70–574-Civ-J)

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, FLORIDA EAST COST BUILDING, ST. AUGUSTINE, FLORIDA, PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

(Civil Action No. 70–577-Civ-J)

SEABOARD COAST LINE RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

NOTICE OF APPEAL

I. Notice is hereby given that the Interstate Commerce Commission one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order entered by this Court on February 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk

of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This the 15th day of April, 1971.

LEONARD S. GOODMAN,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

FRITZ R. KAHN,
General Counsel.

APPENDIX G

United States District Court, E. D. New York

(Civ. No. 70–C–700.)

THE LONG ISLAND RAILROAD COMPANY, PLAINTIFF,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

JULY 22, 1970.

Before FRIENDLY, Circuit Judge, MISHLER, Chief District Judge, and BARTELS, District Judge.

FRIENDLY, Circuit Judge. The Long Island Railroad asks us to enjoin the enforcement of an order of the Interstate Commerce Commission in Ex Parte No. 252 (Sub. No. 1) Incentive Per Diem Charges—1968, made under § 1(14)(a) of the Interstate Commerce Act. The order adopted rules and regulations establishing additional "incentive" per diem charges for unequipped boxcars from September 1 through February of each year.[1] The Long Island does not claim a lack of substantial evidence or of rational basis for the order if the Commission was entitled to rely on the study hereafter described without allowing this to be tested and rebutted at an oral hearing. Its criticisms go rather to procedure.[2] Chicago & Northwestern

[1] While the order became effective on June 1, 1970, payments will first become due for September, 1970.

[2] The parties stipulated that the issues presented for decision are:

1. Is it a jurisdictional prerequisite for the prescription of incentive compensation to freight car owners under

Railway Company intervened in support of the order.

The order is the latest chapter in a long history of freight-car shortages in certain regions and seasons and of attempts to ease them. Power over car service and payments by a railroad for the use of cars not owned by it was first conferred on the Commission by the Esch Car Service Act of 1917, 40 Stat. 101. One provision added to the Interstate Commerce Act a new section, now § 1(14)(a):

The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Another provision added the predecessor of § 1(15), which empowers the Commission, whenever it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country * * * either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested

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section 1(14)(2) of the Interstate Commerce Act and sections 553, 556, and 557 of the Administrative Procedure Act, that the Commission grant the affected parties on demand duly made therefor: (a) the opportunity to cross-examine all witnesses of record as well as Commission personnel who conducted the 1968 Freight Car Study, which underlies the rule proposed and adopted by the Commission, and (b) thereafter the opportunity to offer rebuttal evidence and brief or argument.

2. Whether the Commission acted arbitrarily and unreasonably in denying an oral hearing after issuance of its order on January 14, 1969.

3. Whether the Commission adequately summarized the data collected in the 1968 Freight Car Study for the use of the parties to the proceeding prior to relying on the Study in the decision of the case.

carrier or carriers, and with or without notice, hearing, or the making or filing of a report" to take various steps designed to alleviate or end the crisis.

In utilizing the power conferred by § 1(14) to fix compensation by one railroad for use of the cars of another, the Commission had considered, at least since Judge Prettyman's characteristically able opinion for a three-judge court in Palmer v. United States, 75 F.Supp. 63 (D.D.C. 1947), that it could not include in per diem charges any amount designed solely to stimulate the early return of freight cars but was limited to fixing fair compensation in the public utility sense. Despite increases in the amount of such payments[1] and the Commission's use of its emergency powers under § 1(15), car shortages have become an increasingly serious problem. As stated by the Senate Committee on Commerce in 1966, in recommending the amendment of § 1(14) with which we are here concerned, "Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted" S. Rep. No. 386, 89th Cong., 1st Sess., pp. 1-2; see also H. Rept. No. 1183, 89th Cong., 1st Sess. To help the Commission deal with car shortages more effectively Congress added to what had become § 1(14)(a) the following two sentences:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission

[1] The Commission's latest pronouncement on this subject is Chicago, B. & Q. Railway v. New York, Susquehanna & Western Railroad, 332 I.C.C. 176 (1968), sustained in Union Pacific Railroad v. United States, 300 F.Supp. 318 (D.Nebraska), and Boston & Maine Railroad v. United States, 297 F.Supp. 615 (D.Mass.), aff'd per curiam, 396 U.S. 27, 90 S.Ct. 196, 24 L.Ed.2d 142 (1969). The Commission proceeding consumed 15 years!

shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Pursuant to this new authority, the Commission, on June 23, 1966, instituted an investigation, Ex parte No. 252, Incentive Per Diem Charges, see 31 Fed. Reg. 9240, "to determine whether information presently available warranted the establishment of an incentive element increase, on an interim basis, to apply pending further study and investigation," 332 I.C.C. 11, 12 (1967). Representations were received from many railroads, the Commission's Bureau of Enforcement, and other interested parties, and hearings for the examination of witnesses were conducted. The Commission rendered a decision in October, 1967, 332 I.C.C. 11. The agency thought it to be "of the most utmost importance" that before imposing incentive per diem

charges "little, if any, doubt exist as to as the necessity and effectiveness," 332 I.C.C. at 13–14. It considered the available information, consisting of reports summarizing shortages and surpluses for each carrier,—the type of reports regularly made by Class I carriers to the Association of American Railroads—"insufficient to support any valid conclusions in this case," 332 I.C.C. at 17. While discontinuing the proceeding, it announced that it was embarking "on an investigatory-research program which will use sampling procedures developed and administered by our staff to provide current data on valid car orders and the available supply of operative cars to meet actual needs" and other studies relevant to the discharge of its duties under the 1966 amendment. Two Commissioners dissented, arguing in effect that the agency should not defer action that was plainly needed in a quest for a degree of certainty whose attainment, if possible at all, would take much time.[4]

In December, 1967, the Commission initiated the rule-making proceeding that gave rise to the order here under review, 32 Fed. Reg. 20987. It directed 72 Class I and 63 Class II line-haul railroads to compile and report detailed information with respect to freight car demand and supply at 2641 sample stations for selected days of the week during 12 four-week periods beginning January 29, 1968. The proceeding was "assigned for hearing" at the Washington office of the Commission "on a date hereafter to be fixed;" consideration would be given to requests for hearings at other places.

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[4] The dissents remind the writer of his comment in 1960, that "the agencies have gone overboard in their zeal for a record that will drain the last dregs from the cask—and sometimes a good many staves as well." A Look at the Federal Administrative Agencies, in Benchmarks 65, 72 (1967).

In response to petitions filed by ten railroads (including the Long Island) early in 1968 for clarification of the order initiating the proceeding and for a pre-study conference, the staff conducted such a conference on April 23, which counsel for the Long Island attended. There was an extensive agenda, including several items relating to the disclosure of staff work papers and data obtained in the study. A detailed report of the results of the conference was sent to all parties. The Commission kept close watch over the data being supplied and, on July 22, 1968, called the railroads' attention to some instances of improper reporting although these were regarded as "rare" and "minor." Also, on January 24, 1969, it issued a further order indicating that as a result of the processing and a preliminary analysis of the accumulated data, "certain revisions and refinements" appeared desirable. The Commission sought the views of the parties about the revisions and suggested that any party disagreeing with the need for the further study should submit "its alternate suggestions, if any, as well as any suggestions as to additional studies which are deemed necessary to supplement those which are involved here." Various parties responded; the Long Island thought the proposed new study would be "useless and ridiculous" and a "waste of time and money on a wild goose chase." The proposed new study was not further pursued.

The Chairman of the Commission, another Commissioner who had dissented from the discontinuance of the 1967 proceeding, and members of the agency's staff appeared at a hearing before the Sub-committee on Surface Transportation of the Senate Committee on Commerce on May 13, 1969. See 91st Cong. 1st Sess., Serial No. 91–8. They presented a staff "Report of the Results of Freight Car Study in Ex Parte

No. 252 (Sub No. 1)." This included a narrative summary and analysis, a set of five tables of data, and a justification of the statistical reliability of the underlying information. The Chairman announced the Commission's intention to give the study "to the railroads in the very near future," *id.* at 4, and then to proceed to have "the validity of the study's conclusions * * * tested against other evidence" to be received "in the hearings which must be held before any incentive per diem rates can be established."

To say that the presentation was not received with enthusiasm would be a considerable understatement. Senators voiced displeasure at the Commission's long delay in taking action under the 1966 amendment, engaged in some merriment over what was regarded as an unintelligible discussion of methodology, *id.* at 119, and expressed doubt about the need for a hearing, *id.* at 116–17 (Senator Hartke), 119, 130 (Senator Magnuson). But the Commission's general counsel insisted that a hearing was needed, *id.* at 117, 119, and the Chairman of the Commission agreed, *id.* at 127.

The expressed intention to make the staff report available to the railroads shortly after the Subcommittee hearings was not carried out as such, although counsel for the intervenor obtained a copy and counsel for the Long Island acknowledges seeing the tables in the spring of 1969. The principal reason for this, apparently, was not any desire for secrecy but rather that the tables in this report assembled the data only for the first six and second six periods (as well as for the full year), a division which, it was concluded, was not sufficiently refined. In any event seven months later, in December 1969, an Interim Report of the Commission was released.

In the Report the Commission announced its tentative conclusion to adopt an incentive per diem charge

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for standard boxcars only. This was to be payable only during the six months period from September 1 to the end of February. Since the incentive charge was to produce an additional 6% return over and above the 6% already fixed as fair compensation, the incentive payment during the six months was to be at the rate of 12% on depreciated cost. "Net incentive balances" were to be set aside in a reserve earmarked for the purchase of general service, unequipped boxcars in addition to normal replacements. The Interim Report included a sixteen page description of "The Railroad Freight Car Study" and nine pages of data and graphs drawn from it. In some respects the material was more and in other respects less detailed than the document presented to the Senate Subcommittee, to which reference was made. Attached to all this were a proposed rule embodying the Commission's tentative conclusions and an order directing that "verified statements of facts, briefs and statements of position" should be filed on or before February 24, 1970, and replies a month later, and "that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced." One Commissioner thought oral hearing was required.

Nine railroads including the Long Island sought an oral hearing. The Long Island's request, made in the form of a motion for modification of the Interim Order, contended that the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557, guaranteed this as a matter of right and alleged compendiously that it was impossible for the carrier "to file a meaningful brief as a party respondent to this proceeding until it has had an opportunity to see the evidence it is being confronted with, crossexamine the proponents' witnesses and rebut such evidence as it deems approp-

priate." In April 1970 the Commission entered a decision without having accorded an oral hearing. On that issue it found, referring to the APA:

> No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that act.[5] On the merits, after considering the comments that had been received, including the Long Island's request for an exemption of "all the predominantly terminating railroads of the northeast section of the nation," it adhered to the tentative conclusions of the Interim Report, with certain modifications not here material. It reiterated that the proceeding was "open-end"; that its studies concerning freight car shortage were continuing; and that "hearings or further proceedings may be necessary later as experience is gained under the incentive plan."

[1] The Long Island properly concedes "that the setting of rates for future application, including compensation to be paid by railroads for the use of freight cars not owned by them, is within the meaning of the terms 'rule' and 'rulemaking' as defined by subparagraphs (4) and (5) of Section 551 of the APA." Thus the Commission was obliged to proceed in accordance with § 553(c):

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

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[5] At another place in its report the Commission said:

> In the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern, the requests for oral hearing, cross-examintion, and argument are hereby denied.

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The Long Island seeks to avoid the effect of the first sentence of this subsection, which would foreclose its claim to an oral hearing, by invoking the last. Sections 556 and 557, there referred to, prescribe procedures for hearings "required by section 553 [rulemaking] or 554 [adjudication] of this title to be conducted in accordance with this section" and provide that

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

5 U.S.C. § 556(d).

The occasion for enacting the third sentence of § 553(c) is clearer than its meaning. When Congress adopted the rulemaking provision of the APA, it was obliged to take into account that in many regulatory statutes it had prescribed a "hearing" in cases of "legislative" action where due process would not require one of the traditional trial type. Congress could have provided in the APA that, despite such prior action, only "rulemaking" procedures would henceforth be required when the agency was making rules. It could have provided on the other hand that whenever a particular regulatory statute required a hearing, one of the trial type must be had even though the matter under consideration was a proposed rule. Instead it directed a trial-type hearing in the case of rules "required by the statute to be made *on the*

record after opportunity for agency hearing" (emphasis supplied).

At the time only a few federal regulatory statutes used the italicized phrase or an equivalent. The statute generally referred to as somewhat of a horrible example in this respect, see 1 Davis, Administrative Law Treatise, § 6.06, at 381–82 (1958), is the regulations provision of the FDA, 21 U.S.C. § 371(e) (3). Another, adopted subsequent to the APA and parroting the language of the last sentence of § 553(c), is the Fulbright Amendment of the Walsh-Healey Act, 41 U.S.C. § 43a, see Wirtz v. Baldor Elec. Co., 119 U.S. App.D.C. 122, 337 F.2d 518 (1964). The Attorney General's Manual on the Administrative Procedure Act, p. 34 (1947), summarized what it termed "persuasive legislative history to the effect that Congress did not intend sections 7 and 8 [now 5 U.S.C. §§ 556 and 557] to apply to rule making where the substantive statute merely required a hearing." On the other hand, whatever Congress may have meant by a phrase carrying the mind back to the use of certiorari by the 17th century King's Bench, see Wade, Administrative Law 116–18 (2d ed. 1967), it is rather hard to believe that the last sentence of § 553(c) was directed only to the few legislative sports where the words "on the record" or their equivalent had found their way into the statute book. Thus the Manual states, somewhat inconsistently with the passage just quoted, that "where rates or prices are established by an agency after a hearing required by the statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing," and, in consequence, that Interstate Commerce Commission orders "which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies

Act on the basis of the evidence adduced at the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.'" *Id.* at 33–34.

The trend of judicial decision has been to extend the agencies' powers to handle their problems by rulemaking. Two decisions of the Supreme Court have held that the statutory requirement for a hearing does not preclude an agency "from particularizing standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." F. P. C. v. Texaco, Inc., 377 U.S. 33, 39, 84 S.Ct. 1105, 1109, 12 L.Ed. 2d 112 (1964), thus explaining United States v. Storer Broadcasting Co., 351 U.S. 192, 205, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). Siegel v. Atomic Energy Comm'n, 130 U.S.App.D.C. 307, 400 F.2d 778, 781-786 (1968), held that the last sentence of § 553(e) does not require adjudicative procedures with respect to the adoption of a rule excluding a certain topic from investigation in a licensing proceeding, despite a statutory requirement of a hearing "in any proceeding * * * for the granting * * * of any license or construction permit * * * and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees * * *." Courts of appeals have held that the "argument-type" hearing provided by the first sentence of § 53(c) was sufficient in respect of rules, made pursuant to general rulemaking powers, which modified all existing licenses although the regulatory statute required a hearing, presumably of the trial type, for the modification of an individual license on the basis of facts peculiar to the licensee. Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (2 Cir. 1960), cert. denied, 366 U.S.

962, 81 S.Ct. 1923, 6 L.Ed.2d 1254 (1961); American Airlines, Inc. v. C. A. B., 123 US.App.D.C. 310, 359 F.2d 624, 628–629 (in banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); California Citizens Band Ass'n v. United States, 375 F.2d 43 (9 Cir.), cert. denied, 389 U.S. 844, 88 S.Ct. 96, 19 L.Ed.2d 112 (1967); WBEN, Inc. v. United States, 396 F.2d 601, 617–619 (2 Cir.), cert. denied, King's Garden, Inc. v. F. C. C., 393 U.S. 914, 89 S.Ct. 238, 21 L.Ed.2d 200 (1968). However, in these cases, as well as in George A. Rheman Company v. United States, 133 F.Supp. 668 (E.D. Carolina, 1955), and Tidewater Express Lines, Inc. v. United States, 281 F.Supp. 995 (D.Md.1968), upholding the Commission's power to define the commercial zone of a city under the exemptive provision of the Motor Carrier Act, 49 U.S.C. § 303(b) (8), by rulemaking proceedings, the agency was purporting to act under a section of the regulatory statute empowering it to make rules without a hearing. The question thus was whether such a grant overrode a requirement for hearings in individual cases, and the issue whether even if "rulemaking" was appropriate, the last sentence of § 553 (c) did not require compliance with § 556 was not presented.

[2] Without in any way disagreeing with these decisions, we uphold the Long Island's contention that the third sentence of § 553(c) was applicable. We do not have here a case where an agency is utilizing a general rulemaking power—as to which indeed Title I of this oldest of federal regulatory statutes is notably vague—in order to avoid the need for multiplicitous individual proceedings; the Commission was implementing a statutory direction for fixing future payments which almost necessarily contemplated action on something other than an individual basis. It is true

that for that very reason Congress by appropriate language could have empowered the Commission to do this by rulemaking without an adjudicatory hearing. See WBEN, Inc. v. United States, *supra*, 396 F.2d at 618. Instead Congress attached the Commission's authority to include an incentive element in per diem to a 1917 statute which required a "hearing."

However broad the meaning of "hearing" has now come to be, see 1 Davis, Administrative Law Treatise, § 6.05 (1958), we entertain no doubt that the 1917 Congress thought that, even in a context where the Commission would be prescribing only with respect to future payments, that term meant what the Supreme Court had said in I.C.C. v. Louisville & Nashville Railroad, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431 (1913), namely a proceeding in which "all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal," *—in other words a hearing "on the record." The Commission does not

*This view is reinforced by the contrast, frequently encountered in the Interstate Commerce Act, between what the Commission may do only "after hearing," the words used in § 1(14)(a), and what it may do with something less, e.g., § 1(15). In this respect the case before us is somewhat the converse of Seatrain Lines, Inc. v. United States, 168 F. Supp. 819, 825–826 (S.D.N.Y. 1958), which held that the first sentence of § 553 of the APA controlled under § 4(1) of the Interstate Commerce Act, authorizing the Commission "after investigation" to allow a carrier "in special cases" to charge less for a longer than for a shorter distance, in part because of the contrast between this language in § 4(1) and that in § 4(2), providing that a rail carrier which had reduced rates to meet water competition could not increase them "unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

deny that it had always proceeded in this manner in administering § 1(14) before the 1966 amendment, see, e.g., Increased Per Diem Charge on Freight Cars, 268 I.C.C. 659 (1947); Chicago, Burlington & Quincy Railroad v. New York Susquehanna & Western Railroad, 297 I.C.C. 291 (1955), 332 I.C.C. 176 (1968); Investigation of Adequacy of Railroad Freight Car Ownership, Docket No. Ex parte 241, 335 I.C.C. 264 (1969). Contrast Seigel v. Atomic Energy Comm'n, *supra*, 400 F.2d at 785–786. When the Commission sought the additional authority conferred by Congress in 1966, it emphasized that § 1(14) provided for hearings which, as its Chairman stated, "would be necessary in any event to determine among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting the deficiencies." Hearings before House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. 89–26, at p. 45 (1965); Hearings before Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess., Ser. 89–23, at pp. 14–15 (1966). The Commission conducted evidentiary hearings in the abortive 1967 incentive compensation proceeding, 332 I.C.C. 11, and intended to do so in this one, as its order initiating the proceeding and its statements to the Senate Subcommittee made clear. Moreover, the Commission's reference to § 556 in the statement from its April 1970 Report quoted above seems to assume that the last sentence of § 553(c) applies. In all these respects the case differs from Joseph E. Seagram & Sons Inc. v. Dillon, 120 U.S.App.D.C. 112, 344 F.2d 497, 499 n. 3 (1965), where a requirement that the Secretary of the Treasury give an "opportunity for hearing" before prescribing regulations under 27 U.S.C. § 205 was held not to demand adjudicatory procedures.

[3, 4] However, our agreement with the Long Island that the third sentence of 5 U.S.C. § 553(c) was applicable does not conclude the case in its favor. What Congress gave by that provision of the APA, it partially took away by another. The final sentence of § 556(d) provides:

> In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Congress thus determined that even when rulemaking had to be done by a hearing "on the record," the record did not always have to be made in the traditional manner.[7] The Interim Report indicated the Commission's intention to rely on this provision, and it is no matter that the agency initially planned to do otherwise or that its decision to adopt a more expeditious procedure may have been prompted by Senatorial spurs. The sole question for us is whether the statutory conditions were met.

The Long Island contends that the evidence on which the Commission relied was never "submitted," as § 566(d) requires. It urges that if the Commission wished to dispense with an oral hearing, the agency was obliged to place in evidence the 32,420 data sheets filed by the carriers and the field and staff audits of these on which the Commission admittedly relied. Conceding that "at first blush, it might seem a futile waste of time and money to remand" to the Commission for this purpose, the Long Island urges that giving the parties a reasonable opportunity to examine and eval-

[7] Compare the Commission's "modified procedure" in certain rate cases prescribed in §§ 1.45–1.54 of its General Rules of Practice, discussed in Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (W.D.N.Y. 1963).

uate these materials is demanded by minimum requirements of fair play.

[5] We agree it would have been better if the Commission had served upon the carriers a summary of the study more nearly resembling the 106 printed pages of text and tables it had presented to the Senate Subcommittee, revised in whatever manner the agency deemed to be desirable for the purpose in hand.* But the Interim Report placed the railroads on notice of the document that had been given to the Senate Subcommittee, most of which the Long Island had in fact seen, and which it would have been a simple matter for any carrier to obtain, and the analysis of the study in the Report was adequate to apprise the carriers of the general results and the conclusions drawn from them. The data sheets and audits would hardly have been placed in evidence

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*In answer to a question from the bench, the Commission has advised in a supplemental memorandum that the staff did not prepare a subsequent report for the Commission comparable to the report submitted to the Senate Subcommittee. Part of the disparity between the length of the study submitted to the Senate Subcommittee and the summary in the Interim Report is due to the fact that the former included all types of freight cars whereas the latter was limited to unequipped, general service boxcars to which alone the proposed incentive per diem charges were to apply. However, the study given to the Subcommittee included other information, e.g., tables showing the number of days of delay in filling orders, which might have been useful to the railroads. The Long Island urges in its reply to the Commission's supplemental memorandum that further examination of the data might have shown a correlation between over-orders and long delays in filling orders and that the Commission's conclusion that "no such correlation is possible on the present record" simply reflects the agency's refusal to accord a fair hearing. But this issue had always been present and, as developed below, the Long Island could readily have obtained whatever additional data it needed for arguing its case.

if an oral hearing had been held. Their importance would have lain in possibly disclosing materials useful in cross-examining the staff witnesses or more likely, in view of the rarity of expert concession of error, in developing rebuttal. Whether there was to be an oral hearing or not, the Long Island's first job was to examine the basic data and find this out. Nothing stood in its way. The carriers had been advised at the April 1968 conference that tapes of the reported data could be made available, on request, to the Association of American Railroads; it developed that the cost of such a tape would have been only $37. It appears that on receiving the Interim Report the Long Island did obtain tapes showing what the burden of the proposed order on it would be; it could as well have obtained the rest. It could also have sought access to the audits and to other work papers prepared by the agency's staff as a basis for the summary in the Interim Report.* If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal. The last sentence of § 556(d)

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*If the Commission had not made these available, as we assume it would, they could have been obtained under 5 U.S.C. § 552(a)(3). Since any such underlying tabulations would be available on discovery in ordinary litigation, they would not fall within the exception of § 552(b)(5). See Bristol-Myers Co. v. FTC, 424 F. 2d 935, 939 (D.C. Cir. 1970). Staff memoranda making policy recommendations to the Commission stand differently.

would be deprived of all meaning if this were held sufficient to put the agency on notice that "prejudice" would result from the denial of an oral hearing. Even taking into account the further representations that have been made to us, we fail to see that prejudice has been established.

The short of the matter is that the decision here called for a leap of judgment by the Commission which detailed figures would inform but could not determine. Of course, if there were no car shortages in some regions and simultaneous surpluses elsewhere, there would be no occasion for incentive compensation. No one contested that there were; the dispute was over the degree and the cause. Both these issues were dealt with extensively in the verified statements submitted by the carriers, and we have yet to hear how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided materially in their resolution.[10] When all had been said, the serious questions

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[10] The Long Island's own verified statement in opposition to the proposed order was, for the most part, an argument that "the real culprit for violations of car service rules has been the consignee who after unloading a car reloads it with his products and sends it off in an entirely different direction than it came from" and that the grain industry utilizes boxcars for warehousing rather than transportation; the statement also argued for exemption as a terminating road. While the statement reiterated the demand for oral hearing, it advanced no specifics why this would be helpful.

In its brief to us the Long Island directed attention to the verified statements of Andrew C. Weamer on behalf of Penn Central Transportation Company and its affiliates and of Clifford J. Janis on behalf of Union Pacific Railroad Co. Mr. Weamer's statement conceded that "The study data appears to have been gathered by recognized methods of sampling and statistical techniques" but vigorously attacked the validity of the conclusions drawn. It did not suggest any need for cross-

remaining for the Commission were whether some form of incentive compensation would, in the words of the statute, "contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense," and, if so, what the form should be. Even the first question is by no means so easy of solution as the mere combination of shortages in some regions and concurrent surpluses in others might suggest. Whether the Commission provided right, or even rational, anwers to these difficult questions is not before us in light of the stipulation of the parties limiting the issues, see fn. 2. Our sole task is to determine whether under all the circumstances the denial of an oral hearing significantly prevented the Long Island from fairly presenting its case. We have found no sufficient reasons to return an affirmative response.

The clerk is directed to enter judgment dismissing the complaint.

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examining the Commission's staff as to the accuracy of the data or for the presentation of "live" rebuttal testimony. Mr. Janis' statement relied on the fact that in proposing a new study for 1969–70 the Bureau of Enforcement had admitted that some of the questions in the 1968 study invited "judgment determinations by personnel assembling data"; he also pointed to some instances in which the 1968 study had rejected data "due to high variability in the estimate using the data with substitution of days." While Mr. Janis thus concluded "that the 1968 study cannot conclusively show that there is a shortage of plain boxcars," he indicated no respect in which cross-examination of the Commission's staff would be helpful and went on to argue that, instead of the proposed incentive *per diem*, the Commission could better promote the purchase of boxcars by a basic *per diem* that would take account of the effects of inflation on the investment. Whatever the force of this argument, nothing would be gained by its presentation as oral testimony.

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